TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 342

AMALGAMATED UTILITY WORKERS, AFFILIATED WITH UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS, PETITIONER,

vs.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 30, 1939.

CERTIORARI GRANTED OCTOBER 16, 1939.

SUPREME COURT OF THE UNITED STATES

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vs.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. AND ITS AFFILIATED COMPANIES, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol.1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of the Application of

AMALGAMATED UTILITY WORKERS, affiliated with Utility Workers Organizing Committee, Congress of Industrial Organizations,

TO PUNISH

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. and its Affiliated Companies, Brooklyn Edison Company, Inc., New York and Queens Electric Light and Power Company, Westchester Lighting Company, the Yonkers Electric Light and Power Company, New York Steam Corporation, and Consolidated Telegraph and Electrical Subway Company, For Contempt.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. and its Affiliated Companies, et al., Petitioners,

AGAINST

NATIONAL LABOR RELATIONS BOARD, ET AL., Respondents.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. B-825, ET AL., Petitioners,

AGAINST

NATIONAL LABOR RELATIONS BOARD, ET AL., Respondents.

STIPULATION AS TO TRANSCRIPT OF RECORD, ETC.—Filed August 25, 1939

The movant Amalgamated Utility Workers, etc., having informed the respondents Consolidated Edison Company of New York, Inc., et al., that it is about to apply to the Supreme Court of the United States for a writ of certiorari [fol. 2] to review, in the respect hereinafter stipulated, the Order made on or about June 2, 1939, by the United States Circuit Court of Appeals for the Second Circuit, which denied the movant's motion for an Order adjudging

Consolidated Edison Company of New York, Inc., its affiliated Companies, and their directors, officers and agents, in contempt of Court, etc.; and the undersigned parties having agreed, by their respective solicitors, that the petitioner for certiorari need not for such purpose designate for inclusion the complete record and all the proceedings and papers herein:

It is hereby stipulated and agreed:

I. That the petitioner for certiorari intends to bring up for review, and to rely upon, only the question as to whether or not the movant Amalgamated Utility Workers has standing to make and maintain its said motion, which was denied by the United States Circuit Court of Appeals for the Second Circuit.

II. That in view of the foregoing, the record to be certified by the Clerk of this Court, and printed, shall contain only the following papers on file in this Court:

1. Notice of Motion served by the solicitors for the Amalgamated Utility Workers.

2. Petition and Motion of Amalgamated Utility Workers dated May 10, 1939, with notation of verification.

3. Answer of Consolidated Edison Company of New York, Inc., et al., dated May 22, 1939, with notation of verification.

4. Affidavit of Floyd L. Carlisle, sworn to May 22, 1939, [fol. 3] and accompanying the Answer, together with Exhibits A to H, both inclusive, attached to such Affidavit.

5. Response of National Labor Relations Board, dated May 13, 1939, by its General Counsel and Associate General Counsel, to the said motion of the movant Amalgamated Utility Workers.

6. Memorandum Opinion of the United States Circuit Court of Appeals for the Second Circuit, denying the said motion of the Amalgamated Utility Workers.

7. Order of the United States Circuit Court of Appeals for the Second Circuit, made June 2, 1939, denying the motion of the Amalgamated Utility Workers.

III. That upon the hearing of any application by Amalgamated Utility Workers, etc., for such a writ of certiorari,

and upon any hearing of the case by and before the Supreme Court of the United States if certiorari be granted, the respondents Consolidated Edison Company of New York, Inc., et al., may submit to the Court, and refer to, any other notices of motion or any other affidavits submitted with the motion, the petition, or the answer, and which were filed with the Circuit Court of Appeals for the Second Circuit by either side; and that any other party to the proceeding may likewise submit to the Court and refer to any other notices or affidavits which were filed with this Court upon such motion.

Dated, New York, August 24, 1939.

Boudin, Cohn & Glickstein, Solicitors for Amalgamated Utility Workers, etc.

Whitman, Ransom, Coulson & Goetz, Solicitors for Consolidated Edison Company of New York, Inc., and its Affiliated Companies.

[fol. 4] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

NOTICE OF MOTION

Sirs:

Please take notice that on the 15th day of May, 1939, at 10:30 A. M., or as soon thereafter as counsel can be heard, a motion as per the attached copy, will be made [fol. 5] before the Court, to adjudge Consolidated Edison Company of New York, Inc., and its Affiliated Companies, Brooklyn Edison Company, Inc., New York and Queens Electric Light and Power Company, Westchester Lighting Company, The Yonkers Electric Light and Power Company, New York Steam Corporation, and Consolidated Telegraph and Electrical Subway Company, their officers, directors and agents in contempt.

Boudin, Cohn & Glickstein, Solicitors for Amalgamated Utility Workers, the Moving Party Herein.
By Hyman W. Glickstein.

To:

Whitman, Ransom, Coulson & Goetz, Esqs., Solicitors for Consolidated Edison Company of New York, Inc., et al., 40 Wall Street, New York City.

Charles Fahy, Esq., General Counsel, National Labor Relations Board, Shoreham Building, Washington, D. C.

Allan Perl, Esq., Acting Regional Attorney, National Labor Relations Board, Woolworth Building, New York City.

Isaac Lobe Straus, Delafiedd, Marsh, Porter and Hope, and Claude A. Hope, Esqs., Solicitors for International Brotherhood of Electrical Workers, et al., 20 Exchange Place, New York City.

Consolidated Edison Company of New York, Inc. and its Affiliated Companies, 4 Irving Place, New York City.

[fol. 6] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

MOTION FOR ORDER ADJUDGING CONSOLIDATED EDISON CO., ET AL., IN CONTEMPT

Now comes the Amalgamated Utility Workers, affiliated with the Utility Workers Organizing Committee, C. I. O., formerly known as United Electrical & Radio Workers of America, and moves this Court to adjudge Consolidated Edison Company of New York, Inc. and its Affiliated Companies, Brooklyn Edison Company, Inc., New York and [fol. 7] Queens Electric Light and Power Company, Westchester Lighting Company, The Yonkers Electric Light and Power Company, New York Steam Corporation, and Consolidated Telegraph and Electrical Subway Company, hereinafter referred to as the "Companies", and their officers, directors and agents, in contempt of this Court for violation of the decree heretofore made and entered by this Court on March 21st, 1938, as amended by an order of this Court, made and entered on the 21st day of January, 1939, in certain proceedings entitled Consolidated Edison Company of New York, Inc. et al., petitioners, against National Labor Relations Board, respondents, and as reasons for such motion shows the Court:

1. The National Labor Relations Board, hereinafter referred to as the Board, pursuant to authority conferred upon it by an act of Congress, approved July 5, 1935, (49

Stat. 449, 29 U. S. C. A. Sec. 151 *et seq.*), known as the National Labor Relations Act, issued its complaint against said Consolidated Edison Company of New York, Inc., and its Affiliated Companies, hereinafter collectively referred to as the "Companies", alleging that said companies were engaging in and had engaged in certain unfair labor practices affecting commerce within the meaning of the National Labor Relations Act, which complaint, together with a notice of hearing thereof, was served upon said Companies, upon the United Electrical and Radio Workers of America, and upon the International Brotherhood of Electrical Workers, hereinafter referred to as the "I. B. E. W."

2. Thereafter, hearings were held on June 3rd, 10th, 11th, 14th, 15th, 16th, 17th, 23rd and 24th, and July 6th, 1937, before a Trial Examiner duly designated by the Board. The Companies were represented by counsel and participated in the hearing. The I. B. E. W. did not appear at the [fol. 8] hearings. By order of the Board dated September 29th, 1937, the proceeding was transferred to and continued before the Board in accordance with its hearings.

3. On November 10, 1937, the Board, having first considered the matter, and being sufficiently advised in the premises, duly stated its findings of fact and conclusions of law and issued and caused to be served on the said Companies its order to cease and desist and to take affirmative action as follows:

"Upon the basis of the above findings of *of* fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondents, Consolidated Edison Company of New York, Inc., and its affiliated companies: Brooklyn Edison Company, Inc., New York and Queens Electric Light and Power Company, Westchester Lighting Company, The Yonkers Electric Light and Power Company, New York Steam Corporation, Consolidated Telegraph and Electrical Subway Company, their officers, agents, successors, and assigns shall:

1. Cease and desist from:

a. Discouraging membership in United Electrical and Radio Workers of America or any other labor organization of their employees, or encouraging membership in Interna-

tional Brotherhood of Electrical Workers or any other labor organization of their employees, by discharging or refusing to reinstate any of their employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment because of membership or activity in connection with any such labor organization;

b. Urging, persuading, warning, or coercing their employees to joint International Brotherhood of Electrical Workers, or any other labor organization of their employees, or threatening them with discharge if they fail to join any such labor organization;

c. Permitting organizers and collectors of dues for International Brotherhood of Electrical Workers or any other labor organization to engage in activities among their employees in behalf of such labor organizations during working hours or on the respondents' property, unless similar privileges are granted to United Electrical and Radio Workers of America and all other labor organizations of their employees;

[fol. 9] d. Permitting their employees who were officials of the Employees' Representation Plans to use the respondents' time, property, and money in behalf of International Brotherhood of Electrical Workers or any other labor organization of their employees;

e. Employing detectives to investigate the activities of their employees in behalf of United Electrical and Radio Workers of America or any other labor organization of their employees or employing any other form or manner of espionage for such purposes;

f. Giving effect to their contracts with the International Brotherhood of Electrical Workers;

g. Recognizing the International Brotherhood of Electrical Workers as the exclusive representative of their employees;

h. In any other manner interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

a. Offer to Martin A. Wersing, Julius A. Greulich, Michael A. Wagner, William J. Kennedy, John F. Emler, and Stephen L. Solosy immediate and full reinstatement to their former positions without prejudice to their seniority and other rights or privileges;

b. Make whole Martin A. Wersing, Julius A. Greulich, Michael Solosy for any loss of pay they have suffered by reason of their discharges, by payment to each of them of a sum equal to that which he would normally have earned as wages during the period from the date of his discharge to the date of such offer of reinstatement, less the amount earned by him during such period;

c. Post immediately notice to their employees in conspicuous places through their offices, buildings, plants, and other places of employment stating: (1) that the respondents will cease and desist in the manner aforesaid; (2) that the respondents' employees are free to join or assist any labor organization for the purposes of collective bargaining with the respondents; (3) that the respondents will bargain collectively with any labor organization entitled thereto; (4) that the respondents will not discharge, or in any manner disciminate against members of United Electrical and Radio Workers of America or any other labor organization of their employees or any person assisting such organizations by [fol. 10] reason of such membership or assistance; (5) that the respondents will not discharge, or in any manner discriminate against any employee for refusal or failure to join or assist International Brotherhood of Electrical Workers or any other labor organization of their employees; (6) that such notices will remain posted for a period of at least thirty (30) consecutive days from the date of posting;

d. Notify the Regional Director for the Second Region in writing within ten (10) days from the date of this Order what steps the respondents have taken to comply herewith.

The complaint, in so far as it alleges that the respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(2) of the Act, is hereby dismissed without prejudice."

4. Thereafter, pursuant to Section 10(e) of the National Labor Relations Act, the companies filed a petition with this Court, seeking a review of the Board's order. The IBEW and certain locals thereof applied for permission to intervene, which permission was granted. United Elec-

trical & Radio Workers of America, now known as Amalgamated Utility Workers Union, was likewise given permission to intervene and was made a party to the proceeding, said proceedings being listed upon the docket of this Court as "In the Matter of Consolidated Edison Company of New York, Inc. and its Affiliated Companies et al., petitioners, and National Labor Relations Board, respondent," "In the Matter of International Brotherhood of Electrical Workers, Local Union #B-825, et al., Petitioners, against National Labor Relations Board, Respondent."

5. The National Labor Relations Board filed a cross motion to enforce its order.

6. Thereafter, pursuant to Section 10(e) of the National Labor Relations Act, the record of the proceeding before the Board was filed with this Court and said petition duly [fol. 11] came on to be heard.

7. On the 14th day of March, 1938, this Court rendered its opinion approving and enforcing the Board's order.

8. On the 21st day of March, 1938, this Court entered its decree granting the Board's motion for enforcement of its order. Said decree reads as follows:

"Petitions having been filed herein to review and set aside an order of the National Labor Relations Board, and said Board having filed a request for the enforcement of said order, issued on November 10, 1937;

"Upon consideration thereof it is hereby

"Ordered by this Court that the petitions to review and set aside the order of the National Labor Relations Board be and hereby are denied and dismissed;

"And it is further

"Ordered that the said order of the National Labor Relations Board be enforced in full and that the petitioners, Consolidated Edison Company of New York, Inc., et al., abide by and perform each and all of the directions contained in said order."

9. On January 21st, 1939, the mandate of the Supreme Court of the United States having been received by this Court, this Court entered the following order:

"The above entitled cases having been taken to the Supreme Court of the United States by Writ of Certiorari;

And the mandate of said Supreme Court having been received modifying, and as so modified, affirming the decision of this court;

Upon consideration thereof it is ordered that said mandate be filed.

It is further ordered that the decree of this court be modified by providing that paragraph 1-F be stricken from the order of the National Labor Relations Board and that the notice called for by paragraph 2-C of the said order of the Board shall not include the provisions of paragraph 1-F. As so modified the decree of this court entered on March 21, 1938 is hereby affirmed."

[fol. 12] 10. The said Companies have wilfully, deliberately and maliciously failed and refused to obey the aforesaid orders of this Court and are continuing to refuse to obey said orders in that they have violated and are continuing to violate sections 1(b), 1(c) and 1(g) of the aforesaid order of the National Labor Relations Board by permitting organizers and collectors of the I. B. E. W. to enter their properties and engage in union activities among their employees, while at the same time refusing similar privileges to organizers and collectors of the Amalgamated Utility Workers. Said violations of this Court's orders appear more particularly in the annexed affidavits of Arthur C. Joy, Richard Wallace, Harold J. Straub, William A. Fogarty, Thomas Creighton and Peter C. Murphy.

11. The said Companies have wilfully, deliberately and maliciously failed and refused to obey the aforesaid orders of this Court and are continuing to refuse to obey said orders in that they have violated and are continuing to violate sections 1(b), 1(c), 1(e), 1(g) and 1(h) of the aforesaid order of the National Labor Relations Board by urging, persuading, warning and coercing their employees into joining the I. B. E. W. and threatening them with discharge if they failed to join the said I. B. E. W. They have gone so far in their interference with the self-organization of their employees as to require certain employees to become organizers and shop stewards of the I. B. E. W. Said violations of this Court's orders appear more particularly in the annexed affidavits of William A. Fogarty, Richard Wallace, Charles Robert, Edward Enos, Otto Weiss, Robert Barrett, Thomas Creighton, Peter C. Murphy, Harold J. Straub, Herbert Shingler, John B. Roth and Aaron Datz.

[fol. 13] 12. The said Companies have wilfully, deliberately and maliciously failed and refused to obey the aforesaid orders of this Court and are continuing to refuse to obey said orders in that they have violated and are continuing to violate sections 1(b), 1(c), 1(g) and 1(h) of the aforesaid order of the National Labor Relations Board by urging, persuading, warning and coercing their employees into paying dues to the I. B. E. W.; urging persuading, warning and coercing their employees into signing check-off agreements of the I. B. E. W.; collecting said dues for the I. B. E. W. through supervisory employees; and otherwise giving assistance to the I. B. E. W. Said violations of this Court's orders appear more particularly in the annexed affidavits of Sarah Oppenheim, Ricker McConnell, Paul Schuler, Edward Enos, Cleveland C. Edwards, Robert Barrett and William Koeppel.

13. The said Companies have wilfully, deliberately and maliciously failed and refused to obey the aforesaid orders of this Court and are continuing to refuse to obey said orders in that they have violated and are continuing to violate sections 1(a), 1(b), 1(c) and 1(h) of the aforesaid order of the National Labor Relations Board by permitting their employees, supervisory and otherwise to be active in behalf of the I. B. E. W. and forbidding any union activity on the part of their employees who are members of the Amalgamated Utility Workers.

Such activities have included the distribution of I. B. E. W. membership cards, application cards and buttons; the collection of dues; the solicitation of union membership, the signing of check-off agreements.

These practices of the I. B. E. W. are so flagrantly carried on during working hours and upon company property [fol. 14] that the company cannot disclaim knowledge of them. It appears further that much of this activity was carried on in the presence of company supervisory officials and through their connivance.

Said violations of this Court's orders appear more particularly in the annexed affidavits of Paul Schuler, Arthur C. Joy, John B. Roth, Sarah Oppenheim, Edward Enos, Roger K. Larkin, Otto Weiss, Robert Barrett, Thomas Creighton, Richard Wallace, William A. Fogarty, Julius A. Greulich, Franklin E. DeLude, Harold J. Straub, and Aaron Datz.

14. The said Companies have wilfully, deliberately and maliciously failed and refused to obey the aforesaid orders of this Court and are continuing to refuse to obey said orders in that they have violated and are continuing to violate sections 1(b), 1(g) and 1(h) of the aforesaid order of the National Labor Relations Board by discriminatorily transferring Richard Wallace and John Langan from the Hell Gate Generating plant to the Long Island City plant because of their union activities. Said violations of this Court's orders appear more particularly in the annexed affidavits of Richard Wallace, John Langan, Dennis Doris and Franklin E. DeLude.

15. The said Companies have wilfully, deliberately and maliciously failed and refused to obey the aforesaid orders of this Court and are continuing to refuse to obey said orders in that they have violated and are continuing to violate sections 1(b), 1(g) and 1(h) of the aforesaid order of the National Labor Relations Board by permitting their employees, supervisory and otherwise who constitute grievance committees of the I. B. E. W. to meet with the company [fol. 15] for the purpose of discussing grievances, and by refusing to discuss grievances or deal with their employees who constitute grievance committees of the Amalgamated Utility Workers.

Superintendents and other supervisory officials of the Company have openly admitted that their orders from the Companies were to meet only with I. B. E. W. grievance committees, and have attempted to persuade Amalgamated Utility Workers grievance committees of their employees of the merits of "individual bargaining" in preference to grievance committees.

Said violations of this Court's orders appear more particularly in the annexed affidavits of Philip Clark, Julius A. Greulich, Herbert Shingler, Arthur C. Joy, Herbert Rowson, James Gentile, Leon Farol, Raymond Carroll and Cleveland Edwards.

16. The said Companies have wilfully, deliberately and maliciously failed and refused to obey the aforesaid orders of this Court and are continuing to refuse to obey said orders in that they have violated and are continuing to violate sections 1(b), 1(h) and 1(g) of the National Labor Relations Board by recognizing and bargaining exclusively with the I. B. E. W. as the collective bargaining agent of

all the Companies' employees, notwithstanding that the I. B. E. W. has not been certified as the exclusive collective bargaining agent of all the employees in accordance with the provisions of the National Labor Relations Act. Said violations of this Court's orders appear more particularly in the annexed affidavits of Arthur C. Joy and Harold J. Straub.

17. That said companies have failed and refused to obey [fol. 16] the aforesaid orders of this Court and continue to refuse to obey said orders in that they have violated sections 1(b), 1(h) and 1(g) of the Board's order by negotiating and bargaining collectively with the I. B. E. W. and discriminating and extending privileges in favor of the I. B. E. W. while at the same time refusing to negotiate and bargain collectively with, or to extend like privileges to the Amalgamated Utility Workers. Said violations of this Court's orders appear more particularly in the annexed affidavits of Arthur C. Joy, James Gentile, Cleveland C. Edwards and Franklin E. DeLude.

18. The said Companies have wilfully, deliberately and maliciously failed and refused to obey the aforesaid orders of this Court and are continuing to refuse to obey said orders in that they have violated and are continuing to violate sections 1(c) and 1(h) of the Board's order by using espionage to secure information concerning the union activities of their employees who are members of Amalgamated Utility Workers. Said violations of this Court's orders appear more particularly in the annexed affidavit of Richard Wallace.

19. The said Companies have wilfully, deliberately and maliciously failed and refused to obey the aforesaid orders of this Court and are continuing to refuse to obey said orders in that they have violated and are continuing to violate sections 1(b), 1(h) and 2(c) of the Board's order by inadequately posting notices to their employees to the effect that they will cease and desist from interfering with the self-organization of their employees. Said violations of this Court's orders appear more particularly in the annexed affidavits of Richard Wallace, Russel Prime and [fol. 17] William Koeppel.

By reason of the aforesaid continued and persistent violations of the orders of this Court by the Companies, the

rights of the Amalgamated Utility Workers Union, and of its members, guaranteed under the National Labor Relations Act, and as provided in said orders of this Court, have been and are being seriously interfered with and irreparably injured.

That by reason of the aforesaid continued and persistent violations of the order of this Court by the Companies, the aforesaid conduct is contumacious and in contempt of this Court.

Wherefore, Amalgamated Utility Workers, etc. moves (a) that said Consolidated Edison Company of New York, Inc. and its Affiliated Companies, and their respective officers, directors and agents be adjudged in contempt of this Court for having failed to comply with its decree dated March 21st, 1938, as amended by its decree dated January 21, 1939, as hereinabove alleged; (b) that thereafter this Court take such action as shall appear just, reasonable and necessary to make effective the order of the National Labor Relations Board, as ordered to be enforced by this Court, and grant such other and further relief as the nature of this case may require.

Dated: New York, May 10th, 1939.

Amalgamated Utility Workers, by Arthur C. Joy, General Secretary.

[fol. 18] *Duly sworn to by Arthur C. Joy. Jurat omitted in printing.*

[fol. 19] In United States Circuit Court of Appeals
Second Circuit

Memorandum Opinion—Filed June 2, 1939

Motion denied on ground that moving party has no standing to press a charge of civil contempt, if contempt had been committed. Under the National Labor Relations Act the Board is the proper party to apply to the court for an order of enforcement and to present to the court charges that the court's order has not been obeyed.

June 2, 1939.

T. W. S., A. N. H., R. P. P., C. JJ.

[fol. 20] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

ANSWER OF THE COMPANIES TO THE MOTION OF AMALGAMATED UTILITY WORKERS—Filed May 23, 1939

Answering the motion and petition of Amalgamated Utility Workers affiliated with the Utility Workers Organizing Committee, C. I. O., dated May 10, 1939, but reserving all objections to the assumed right of the Amalgamated Utility Workers to maintain this contempt proceeding and to the assumption of jurisdiction by this Court over the proceeding instituted and prosecuted by the Amalgamated Utility Workers, the Consolidated Edison Company of New York, Inc., and its affiliated Companies, Brooklyn Edison Company, Inc., New York and Queens Electric Light and Power Company, Westchester Lighting Company, The Yonkers Electric Light and Power Company, New York Steam Corporation, and Consolidated Telegraph and Electrical Subway Company (hereinafter referred to as "the Companies"), [fol. 21] by their attorneys, Whitman, Ransom, Coulson and Goetz, respectfully allege and show, upon information and belief, as follows:

I. Referring to Paragraphs "1" to "9", both inclusive, of the motion, the Companies admit that certain proceedings were had by and before the National Labor Relations Board, and in this Court, and in the Supreme Court of the United States, during the years 1937 and 1938, and in January of 1939, which eventuated in the modifying decree entered by this Court on January 21, 1939, to which this motion relates. Inasmuch as the full transcript and record of those proceedings are a part of the records of this Court in the review proceedings in which the pending motion is entitled and brought, the Companies ask leave to refer to those records for an accurate and complete statement of the matters and things referred to in Paragraphs "1" to "9", both inclusive, of the motion; and ask leave to refer also to the Opinion filed by the Supreme Court of the United States on December 5, 1938 (305 U. S. 197) to which Opinion the motion herein makes no reference. From the information contained in such transcript and record, the Companies particularly deny the allegation of Paragraph "4" of the motion that in the above-entitled review proceedings in this Court as to the

Order of the National Labor Relations Board dated November 10, 1937, the I. B. E. W. and certain Locals thereof applied for permission to intervene, which permission was granted. From such information, the Companies allege that the I. B. E. W. and the Local Unions thereof constituting employees of the Companies instituted and conducted their own proceedings as an aggrieved party pursuant to Section 10(f) of the National Labor Relations Act, and at all times appeared and acted as petitioners as of right in the review proceedings so instituted, in which the pending motion is in part entitled and brought. Upon the basis of such information, the Companies allege further that the Amalgamated Utility Workers, its predecessor organization, and the Congress of Industrial Organizations, were not permitted to take part in the hearings before the National Labor Relations Board, but that upon the hearing and argument of the review proceedings in this Court, the United Electrical and Radio Workers of America, now stated in the motion to be known as Amalgamated Utility Workers Union, asked and was given permission to intervene, not as a party respondent, but for the sole purpose of arguing and filing a brief in its behalf (R. 1735), by reason of which the counsel for such organization was heard also in the Supreme Court of the United States.

II. Concerning Paragraphs "10" to "19", both inclusive, of the motion, the Companies deny each and every allegation thereof that they, or any of them, have been guilty of [fol. 22] any wilful, deliberate, intentional or malicious violation, or any violation, of the modifying decree entered by this Court on January 21, 1939, or of the Order of the National Labor Relations Board as modified and interpreted by the Opinion and Mandate of the Supreme Court of the United States. The Companies aver that ever since the entry by this Court of its Order of January 21, 1939, they have complied, and have intended to comply, in good faith, with such Order of this Court and with the Order of the National Labor Relations Board as so modified and granted enforcement, and were in fact complying with the Board's Order (as so modified) before the decree of January 21, 1939, was entered. The Companies reply further to specific paragraphs and allegations of the motion:

III. The Companies deny each and every allegation of Paragraph "10" of the motion. Except to the limited and

lawful extent to which officers and agents of the I. B. E. W. have been permitted on Company premises solely for the carrying out of duties in relation to the work of the Grievance Committees constituted under the valid and existing Contracts between the Companies and the I. B. E. W. and for collective bargaining conferences with the Management under the Contracts, the Companies have at no time since January 21, 1939, deliberately or wilfully or knowingly permitted representatives of the I. B. E. W. or any other labor organization to engage in union activities on Company premises. Organizing activities and the collection of dues on Company premises have not been wilfully or knowingly permitted to take place. The existing Contracts between the Companies and the I. B. E. W. contain a provision by which the I. B. E. W. "agrees not to solicit membership on Edison Company time or property" (Article II). The Companies have endeavored in good faith to enforce the above-stated regulations against all officers, agents and representatives of the I. B. E. W. (aside from the collective bargaining representatives and the operation of the Grievance Committees under the Contracts), and endeavored impartially to enforce like restrictions against officers, agents and representatives of the Amalgamated Utility Workers. The above allegations are specifically related to the period since the entry of the Order of this Court on January 21, 1939, but they could be made also as to a long period prior thereto. If prior to the entry of this Court's Order of January 21, 1939, and the posting of the required notices, some members of the I. B. E. W. and some members of the Amalgamated Utility Workers, who are employees of the Companies, have at times engaged in discussions and union activities among their fellow employees on Company property, such activities have been and are contrary to the announced policy of the Management and in spite of reasonable efforts by the Manage-
[fol. 23] ment in good faith to prohibit the same; but as a practical matter it has not been feasible to prevent all discussion and activities in union matters on Company premises, on the part of employees who are members of either labor organization. If the Order of the Board were construed to require the Management to suppress all such discussion and activity at all hazards, the Order as so construed would not only deny the constitutional rights of workers as citizens, but would compel the Management excessively to police the activities of their employees in labor organization

matters. The Companies allege that since January 21, 1939, and theretofore, the representatives and members of the complaining labor organization have been the more conspicuous and flagrant offenders against an impartial curtailment of union activities on Company property. The facts as to the matters alleged in Paragraph "10" of the motion and the affidavits annexed thereto are more fully stated in the accompanying affidavits of Floyd L. Carlisle, Patrick McGrath, James D. Spence, Joseph Clement, Walter Holler, Raymond J. Foster, Ernest B. Marshall, and other affidavits submitted by the Companies.

IV. The Companies deny each and every allegation of Paragraph "11" of the motion, and particularly deny that at any time since the entry of this Court's Order of January 21, 1939, the Companies have urged, persuaded, warned or coerced their employees into joining the I. B. E. W. or have threatened any of them with discharge if they failed to join the I. B. E. W. The Companies further deny that in any instance have their employees been required or directed to become organizers or shop stewards of the I. B. E. W. The facts as to the allegations of Paragraph "11" of the motion and its supporting affidavits are more fully shown in the accompanying affidavits of Alfred J. Wheeler, Jr., Harry Bulock, Marion Little, Ernest B. Marshall, Walter Holler, Raymond J. Foster, J. J. McNamara, William Pachler, John F. Ronan, Walter Donovan, John J. McCarron, Ernest Wesler, Edwin Griffiths, James J. Butler, Ladislav Fencl, and other affidavits submitted by the Companies.

V. The Companies deny each and every allegation of Paragraph "12" of the motion, and particularly deny that at any time since the entry of this Court's Order of January 21, 1939, the Companies have urged, persuaded, warned or coerced any of their employees into paying dues to the I. B. E. W. or into signing check-off agreements or other authorizations in behalf of the I. B. E. W., and deny further that with the approval or knowledge of the Companies any dues for the I. B. E. W. have been collected through supervisory employees. The facts as to the matters alleged in Paragraph "12" of the motion and the affidavits annexed to the same are more fully shown in the accompanying affidavits of J. J. Wittmer, John J. McCar-

[fol. 24] ron, Ernest Wesler, Edwin Griffiths, and other affidavits submitted by the Companies.

VI. The Companies deny each and every allegation of Paragraph "13" of the motion, and particularly deny that at any time since the entry of this Court's Order of January 21, 1939, to the knowledge of the Companies any of their employees have been permitted to be active in behalf of the I. B. E. W. in any of the respects alleged (except to the limited and proper extent stated in Paragraph III hereof), and deny further that union activities on the part of employees who are members of the Amalgamated Utility Workers have been forbidden or restricted to the knowledge of Management except to the proper and limited extent stated in Paragraph III hereof and the affidavits referred to therein. The facts as to the matters and things alleged in Paragraph "13" of the motion and the affidavits annexed thereto are more fully stated in the accompanying affidavits of Floyd L. Carlisle, J. J. Wittmer, Harry Y. Hall, Harry Arffmann, Edward Lemmer, Marion Little, Ernest B. Marshall, Walter Holler, Raymond J. Foster, Walter Donovan, John J. McCarron, Ernest Wesler, Edwin Griffiths, James J. Butler, Ladislav Fencl, Henry A. Maldacker, Sylvester Bundock, and other affidavits submitted by the Companies.

VII. The Companies deny each and every allegation of Paragraph "14" of the motion, and particularly deny that the transfer of Richard Wallace and John Langan from the Hell Gate Generating Plant to the Long Island City Generating Plant, the operation of which had but recently been taken over from the Pennsylvania and Long Island Railroads, was in any manner because of or related to any alleged union activities on the part of either Richard Wallace or John Langan. The Companies allege that such transfers were made in the normal course of operations; were made solely for operating reasons in the proper conduct of the business of the Companies; were stated in advance to such employees to be altogether temporary in character and for such operating reasons; and that upon the completion of the work for which such employees were temporarily transferred to the Long Island City Plant, both Richard Wallace and John Langan were returned to the Hell Gate Generating Plant, as they had been informed in advance would be done. The facts as to the matters alleged

in Paragraph "14" of the motion and the affidavits annexed thereto are more fully shown in the accompanying affidavit of Edward C. M. Stahl.

VIII. The Companies deny that any of them has wilfully, deliberately or maliciously failed or refused, and deny that any of them has failed or refused, to obey any Order of [fol. 25] this Court, or that they are continuing to refuse to obey any Order of this Court or any part of any Order of the National Labor Relations Board as modified and interpreted by the Supreme Court, with respect to any of the matters and things alleged in Paragraph "15" of the motion herein. The Companies aver that they have complied in good faith with Section 9(a) of the National Labor Relations Act, and find nothing in the Board's Order as modified which requires any action or inaction on their part contrary to Section 9(a) of the Act. Each of the Companies has a subsisting Contract with the I. B. E. W. and a Local Union thereof constituting a substantial majority of its eligible employees. Such I. B. E. W. majority has recently been ascertained by a detailed count and check. The validity of such Contracts and their continuance in force have been adjudicated and upheld by the Supreme Court of the United States in the review proceedings in which the pending motion is entitled and instituted. Those Contracts provide, among other things, for the creation and functioning of Grievance Committees, pursuant to which whatever grievances may arise between individual employees who are members of the I. B. E. W. are taken up by that labor organization and adjusted with the Management, in the interests of a fair and amicable settlement without endangering the continuity of work and the rendering of service. As approximately 65 per cent of the eligible employees of the Companies have selected and designated the I. B. E. W. as their representative for collective bargaining and for the adjustment of individual grievances through Grievance Committees of the I. B. E. W., the Companies have dealt with such Grievance Committees pursuant to the Contracts and are continuing to do so. For the reason that the Companies have been advised that the duty imposed by law to bargain collectively and deal with the labor organization selected and designated by a majority of the employees "imposes a negative duty to deal with no other labor organization", and as the Amalgamated Utility

Workers has made no showing that it has even a substantial number of employees of the Companies as members of its labor organization, the Companies have in good faith refused to bargain or deal with representatives or committees claimed to have been constituted by the Amalgamated Utility Workers. At the same time, the Companies have at all times made it clear in writing, to members of the Amalgamated Utility Workers, as the principal moving affidavit by Mr. Joy shows, and to all other employees as well, that it has been and is the policy of the Companies to permit individual employees and suitable groups of individual employees to present and discuss any grievances freely with Management. To the best of the knowledge of the management of the Companies, there has been no instance in which any employees of the Companies, either singly or in suitable groups, have been denied the oppor- [fol. 26] tunity of presenting their grievances freely to Management. The facts as to the conformance of the Companies in good faith with the requirements of Section 9(a) of the National Labor Relations Act, by which the collective bargaining representatives selected by a majority of the employees are stated to become and be the exclusive bargaining agency for all of the employees so far as collective bargaining and representation are concerned, are more fully set out in the accompanying affidavits of Floyd L. Carlisle, J. J. Wittmer, Franklin E. Vilas, and other affidavits submitted by the Companies.

IX. The Companies deny the allegations of Paragraph "16" of the motion that they have failed and refused to obey the Order of this Court and are continuing to refuse to obey the Order of this Court, and deny that they have violated and are continuing to violate the Order of the National Labor Relations Board as modified by the Supreme Court and by the final decree of this Court. The Companies allege that, taking into account the ascertained fact that substantially 65 per cent of their employees have freely become members of the I B E W and have selected the I B E W as their representative for collective bargaining with the Management, the Companies have complied in good faith with the provisions of Section 9(a) of the National Labor Relations Act, according to its plain language and according to its interpretation by the Supreme Court of the United States, and have complied in good faith with the provisions of Section 1(g), and all other provisions, of the Order of the

National Labor Relations Board, as such Section 1(g) and other provisions of such Order were interpreted by the Supreme Court of the United States. The facts as to the matters alleged in Paragraph "16" of the motion and the affidavits annexed thereto are more fully stated in the accompanying affidavits of Floyd L. Carlisle and J. J. Wittmer.

X. For the reasons and under the circumstances stated in Paragraphs III, VIII and IX above and the affidavits accompanying the same, the Companies deny each and every allegation of Paragraph "17" of the motion.

XI. The Companies deny each and every allegation of Paragraph "18" of the motion, and particularly deny that at any time since the entry of this Court's Order of January 21, 1939, or during the years 1937, 1938 or 1939, they have violated Sections 1(e) and 1(h) of the Board's Order by using detectives or espionage to secure information concerning any union activities of any employees who were members of Amalgamated Utility Workers or of any other labor organization. The facts as to the allegations of Paragraph "18" of the motion and the annexed affidavit are stated in the accompanying affidavits of Floyd L. Carlisle and Alfred J. Wheeler, Jr.

[fol. 27] XII. The Companies deny each and every allegation of Paragraph "19" of the motion, and particularly deny that they failed in any manner or to any substantial extent to post and to keep posted, according to the requirements of the Order of the National Labor Relations Board and the Order of this Court of January 21, 1939, the notices required by the Board's Order. The Companies allege that their compliance with the Board's Order in this respect was under the administrative supervision of the National Labor Relations Board acting by and through its Regional Director, and that as a result of an extensive examination and check by a representative of the Regional Director, who visited the Companies' premises and observed the notices in place, the Regional Director reported to the Companies in writing her confirmation of their compliance with the Board's Order as to the posting of notices, all as more fully appears from the accompanying affidavits of Floyd L. Carlisle and Charles H. Wood.

XIII. The Companies deny that they have violated in any respect the Order of this Court or the Order of the National

Labor Relations Board as modified. The Companies deny that they have violated any rights of the Amalgamated Utility Workers or its members under the provisions of the National Labor Relations Act. The Companies deny that by reason of any violations of the Order of this Court or the Order of the National Labor Relations Board, any rights of the Amalgamated Utility Workers Union, or of its members, under the National Labor Relations Act or under any Order of this Court, have been and are being seriously interfered with or have been or are being irreparably injured. The Companies deny that the complaining labor organization has suffered any damage or loss by reason of any acts of the Companies contrary to law or in violation of the Order of this Court or the Order of the National Labor Relations Board as modified. The Companies deny that, by reason of any violations of any Order of this Court, any of the Companies has been guilty of any contumacious conduct and is in contempt of this Court.

And for a separate and distinct defense and as grounds for denying the motion and dismissing the proceeding, the Companies allege, upon information and belief:

XIV. That at all the times referred to in the motion and the accompanying affidavit, a large majority of the eligible employees of each of the Companies have been and are members of the I B E W, and that at all times since January 21, 1939, approximately 65 per cent of the eligible employees of the Companies have been and are members of the I B E W, with dues fully paid. That this majority membership of the I B E W among the employees has lately been verified by a detailed check and count.

[fol. 28] XV. That a large majority of the employees of the Companies have selected and designated the I B E W as their representatives for the purposes of collective bargaining, and have caused Contracts to be made and continued in force between the I B E W and their Local Unions and the Companies. The validity of such Contracts has been upheld by the Supreme Court of the United States (305 U. S. 197), and such Contracts are in full force and effect. Concerning present sub-division (f) (former sub-division (g)) of the Board's order, the Supreme Court stated:

"We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an

exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act. So construed, that subdivision merely applies existing law."

No exclusive bargaining agency other than the I B E W has been established by the Companies' employees pursuant to the provisions of the Act, and the selection of the I B E W by a substantial majority as its representative for the purpose of collective bargaining has been continued in force by such majority.

XVI. Section 9(a) of the National Labor Relations Act provides:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

For further separate and distinct defenses, the above-named Companies severally allege, upon information and belief, the following grounds of objection to the motion and the jurisdiction:

XVII. That the Amalgamated Utility Workers has no standing, under the National Labor Relations Act or otherwise, to institute and maintain the proceeding and motion as set forth in the notice of motion and petition of the Amalgamated Utility Workers.

XVIII. That the National Labor Relations Act does not authorize or permit a labor organization to institute and maintain such a motion and proceeding before this Court.

XIX. That the Amalgamated Utility Workers has not shown itself to be, and is not, a "person aggrieved", within the meaning of Section 10 of the National Labor Relations Act, as to the right of resort to this Court.

[fol. 29] XX. That the motion papers fail to show whether the motion and the proceeding are prosecuted by the Amal-

gamated Utility Workers as in the nature of a civil contempt or a criminal contempt; that the facts alleged in the motion papers and accompanying affidavits do not state and support a charge of either a civil contempt or a criminal contempt, against the employers named; and that neither the motion nor the accompanying affidavits show or allege facts which would establish that any damages were suffered by the complaining labor organization, so as to support a finding of civil contempt.

XXI. That the matters and things stated in the motion and accompanying affidavits are not of judicial cognizance upon the facts alleged and at this time.

XXII. That the motion is in disregard of the Opinion of the Supreme Court of the United States on December 5, 1938, in the review proceedings in which the motion is entitled and brought, which Opinion interpreted the parts of the Order of the National Labor Relations Board on which the motion relies; and that the motion is in effect to secure an enlargement and modification of the Order of the National Labor Relations Board and the final Decree of this Court and by implication and inference to expand the scope and operation of the Order and Decree beyond the fair meaning of what was intended to be prohibited in the light of the issues, so as to make the Board's Order as modified apply to and determine and prohibit matters not litigated, determined and prohibited by such Order and Decree.

XXIII. That if the parts of the Board's Order relied on supporting the motion are now to be construed as meaning what the motion says they mean, rather than what the Supreme Court of the United States said they mean, such parts of the Board's Order are so indefinite and uncertain in meaning and effect that no finding of violations and of a civil or criminal contempt could be predicated thereon.

XXIV. That inasmuch as the Amalgamated's motion was brought without legal right, the "response" thereto and "suggestion" by counsel for the National Labor Relations Board are unauthorized by Section 10 of the National Labor Relations Act and cannot operate to save or sanction a motion which a labor organization cannot institute or maintain under the National Labor Relations Act.

XXV. That the attitude and action of the Companies, as stated in the letter to John McCurley dated February 27, 1939, on which the motion appears principally to be based, show that the Companies have in good faith complied with Section 9(a) of the National Labor Relations Act and with the Order of this Court and the Order of the National Labor Relations Board as modified and interpreted by the Supreme Court of the United States.

[fol. 30] XXVI. That the facts stated in the motion and accompanying affidavits are insufficient to show or constitute a violation of the modifying Decree entered by this Court on January 21, 1939, granting enforcement of the Order of the National Labor Relations Board entered November 10, 1937, as modified and interpreted by the Opinion of the Supreme Court of the United States on December 5, 1938.

XXVII. That if the motion rests or relies at all upon matters not shown by the record in this Court and the subsequent correspondence of the parties, which present questions of law concerning which the Companies have acted in good faith, the motion to that extent rests upon hearsay statements which are contrary to the known facts and in any event can have no probative force in a contempt proceeding.

Wherefore, the above-named Companies severally ask that the motion of the Amalgamated Utility Workers be denied and that the proceeding instituted by it be in all respects dismissed, with costs and disbursements.

Dated, May 22, 1939.

Consolidated Edison Company of New York, Inc., Brooklyn Edison Company, Inc., New York and Queens Electric Light and Power Company, Westchester Lighting Company, The Yonkers Electric Light and Power Company, New York Steam Corporation, Consolidated Telegraph and Electrical Subway Company, by F. L. Carlisle, Chairman of the Board of Consolidated Edison Company of New York, Inc., et al.; Whitman, Ransom, Coulson and Goetz, by William L. Ransom, Solicitors for the Consolidated Edison Company of New York, Inc., et al., No. 40 Wall Street, New York City; William L. Ransom, Henry S. Reeder, P. M. Berkson, of Counsel.

[fol. 31] *Duly sworn to by F. L. Carlisle, jurat omitted in printing.*

[fol. 31½] [File endorsement omitted.]

[fol. 32] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT OF FLOYD L. CARLISLE—IN OPPOSITION—Filed May 23, 1939

STATE OF NEW YORK,
County of New York, ss:

Floyd L. Carlisle, being duly sworn, deposes and says:

I am, and at all of the times mentioned in the motion and accompanying affidavits I have been, the Chairman of the Board of Trustees of the Consolidated Edison Company of New York, Inc. I am Chairman of the Board of Directors also of the Brooklyn Edison Company, Inc., New York and Queens Electric Light and Power Company, Westchester Lighting Company and The Yonkers Electric Light and Power Company, and a member of the Board of Directors of New York Steam Corporation and the Consolidated Telegraph and Electrical Subway Company. For purposes of collective bargaining and questions arising under the National Labor Relations Act, the above-named Companies on one hand and their employees on the other have been treated as a unit by the National Labor Relations Board and by this Court and the Supreme Court of the United States; and I shall usually refer to these seven employers as "the Companies".

I have read the motion of the Amalgamated Utility Workers, the principal accompanying affidavits by A. C. Joy, General Secretary of the Amalgamated Utility Workers, and Harold J. Straub, General Organizing Director of the same organization, and the incidental affidavits by other members of that organization. By the action of the Boards of the respective Companies, I have had general charge and supervision, for the management, of matters pertaining to collective bargaining, and have acted in that capacity after frequent consultations with the directors and officers of the Companies. From my familiarity with the proceedings had by and before the National Labor Relations Board and in the Courts, and from my close contact with the policy and actions of the Companies as to collective bargaining, I believe that I have known the [fol. 33] policy and the action of the Companies, and have

been and am in possession of the facts, as to the matters alleged in the motion and supporting affidavits.

In answer to those allegations, I respectfully state herein the facts according to the best of my knowledge, information and belief; and where allegations are made as to things claimed to have been said or done by persons other than myself, the affidavits of those persons have been obtained, and are submitted, to such extent as such affidavits were obtainable by or in behalf of the Companies, in the time available.

To a large extent, the principal contentions of the motion and supporting affidavits are based upon substantially accurate copies of letters written by me or by other officers or representatives of the Companies to officers or agents of the Amalgamated (see Exhibits "B" and "F", attached to first moving affidavit, by Arthur C. Joy). My letter of February 27, 1939, to John McCurley, President of the Amalgamated Utility Workers, and A. A. Low's letter of March 6, 1939, to Harold J. Straub, General Organizing Director of the Amalgamated Utility Workers, stated the policy and action of the Companies as to the major matters dealt with in the moving affidavits. The correspondence annexed to Mr. Joy's affidavit presents the basis for the principal contention which is now advanced that the Companies have violated and knowingly disregarded and disobeyed the provisions of the Order of the National Labor Relations Board as modified and interpreted by the Opinion of the Supreme Court of the United States, and the final Decree entered by this Court on January 21, 1939, affecting the claimed collective bargaining rights of the Amalgamated Utility Workers.

At no time did Messrs. Joy or Straub, or anyone else connected with the Amalgamated or the C I O, bring to my attention any of the matters now complained of in the motion, aside from the matters which were presented and replied to in the correspondence above referred to, on which the principal affidavit for the Amalgamated is based. In my letter of February 27, 1939, to President McCurley of the Amalgamated, I stated, as I had from time to time announced previously, that——

"If any violation of the Board's Order or of the National Labor Relations Act comes to our attention, we shall deal with it promptly and adequately."

First I wish to deny categorically and emphatically that the Companies have deliberately or knowingly violated the Order of this Court or the Order of the Board as granted enforcement in modified form. I do not believe that these Orders have been violated or disregarded by the Companies in any respect. Despite the controversies which at times have raged between the rival labor organizations among our employees, and despite the things which [fol. 34] have at times been done by employees who are members of the Amalgamated Utility Workers (herein usually referred to as "the Amalgamated" or "the C I O") or of the International Brotherhood of Electrical Workers affiliated with the American Federation of Labor (herein usually referred to as "the I B E W"), I do not believe that anything has been done by the Companies which violates the Order entered by this Court on January 21, 1939. Our intention and policy have been and are to comply fully with the Order and with the National Labor Relations Act.

I. Membership of Employees in Labor Organizations

1. These Companies are engaged in the supplying of electric, gas and steam service, in a large part of New York City and in Westchester County. Continuity, safety and adequacy in their service are essential to the public. As of March, 1939, they had 37,059 employees, of whom some 1,820 were not eligible for membership in labor organizations, because of the nature of their supervisory duties. Of the 35,239 eligible employees, some are members of the I B E W, some are members of the Amalgamated, and some are members of no labor organization.

2. Of the eligible employees, some 22,892, or about 64.9 per cent, are members of the I B E W in good standing, with dues fully paid, and have selected the I B E W as their representative for the purposes of collective bargaining. This membership of the I B E W among our employees was ascertained and verified through a detailed check and count, made in February and March of 1939, in the manner which I shall describe. At the time covered by the proofs before the National Labor Relations Board and the Supreme Court (viz., in June of 1937), the I B E W was shown to have 60 per cent of the employees with dues paid up; in March of 1939, the percentage was shown by the verified records to be 64.9 per cent.

3. The membership of the C I O among our employees has not been stated or disclosed, but I believe that the greater part of our employees who are not members of the I B E W are members of no Union. The moving papers show that the C I O has been invited by me to submit a statement or proof of its membership (see Exhibit "B" attached to affidavit of Arthur C. Joy). This has never been done.

4. In dealing with the claims of the rival labor organizations among our employees, I have kept in mind, and have been advised concerning the effects of, Section 9 (a) of the National Labor Relations Act, which provides:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to [fol. 35] rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

In the moving papers on this motion, I find no statement of C I O membership and no facts which are claimed to show or indicate a C I O majority.

II. The Collective Bargaining Contracts in Force Between the I B E W and the Companies

5. At all times since May and June of 1937, the Companies have had in force collective bargaining agreements with the I B E W and the seven Local Unions which comprise a substantial majority of the employees of each Company. These Contracts provide, among other things, for the adjustment of all grievances and disputes through Grievance Committees and through the National organization of the I B E W, with resort to arbitration if need be, in lieu of strikes or lock-outs for any cause; for the continuance of old age, sickness, disability and retirement benefits; for vacation and hours-of-work schedules, a five per cent increase in pay, etc. The advantages of such Contracts to the public, the employees, and the Companies, are obvious, and have been commented on by the Supreme

Court. A copy of one of these Contracts (with I B E W Local B-829) is hereto annexed as Exhibit "A".

6. The validity of these Contracts was adjudicated by the Supreme Court of the United States (305 U. S. 197), and the Board's Order was accordingly modified by this Court so as to take out the clause which would have disestablished or invalidated these Contracts.

7. By the action of the Local Unions comprising a substantial majority of the employees of the Companies, these Contracts have been continued in full force and effect.

III. Compliance with the Order of the Board as Modified and Granted Enforcement

8. The Order of the National Labor Relations Board, as modified by the Supreme Court (305 U. S. 197) became effective on the entry of the final decree by this Court on January 21, 1939. This Court had by an Order entered on March 21, 1938, stayed the taking effect of its enforcement Order and the Board's Order, pending application by the Companies and by the I B E W for certiorari to the Supreme Court. When the petitions for certiorari were granted, the Companies and the I B E W complied with Rule XXIX, sub-division 3, of the Rules of this Court; and thereby the stay was continued "until the final disposition of the case by the Supreme Court." The decision and Opinion of the Supreme Court in the review proceedings as to this Court's decree of enforcement of the Board's Order of November 10, 1937, was filed on December 5, [fol. 36] 1938. I announced immediately our intention to comply in good faith. The Companies immediately sent a copy of the Opinions, in full, to each of their employees. When the Mandate of the Supreme Court was issued and received, the final and modifying Decree of enforcement was entered by this Court on January 21, 1939. Fully a month before that time, the Companies had shown the good faith of their intended compliance, by doing, at the suggestion of the Regional Director and before the Mandate of the Supreme Court was issued, various acts and things which would be required by the Order when entered.

9. The details of this compliance before the entry of the Order of January 21, 1939, were shown in the preliminary

notification sent to the Regional Director on February 1, 1939, of which a copy is hereto annexed as Exhibit "B". When the notices required by the Order had been duly posted, a notification of the completion of compliance was on that day sent to the Regional Director, on February 20, 1939. A copy is hereto annexed as Exhibit "C".

10. On February 20, 1939, the Companies posted on their numerous bulletin boards throughout their properties two notices to their employees, and the same were kept posted during more than the thirty days required by the Order. Copies of each of these notices, one containing formally and in full the Board's Order as modified and the other advising the employees that the Companies intended to continue to comply with the Order as modified, etc., are hereto annexed as Exhibits "D" and "E", respectively.

11. In the affidavits of Richard Wallace, William Koeppel, and Russell Prime, submitted in support of the motion, it is alleged that in several instances the required notices to employees were not posted or kept posted, in several locations where the affiant members of the C. I. O. allege that they should have been. I believe that there were no substantial omissions of the notices from the places required by the Order of the Board, and I am advised and believe that the matter is not one of judicial cognizance at this time, upon motion by the C. I. O. organization. The time within which the notices were required to be kept posted expired on March 22nd. I am advised and believe the matter was under the administrative supervision of the Board, not the C. I. O. I am informed that on March 6, 7, 8, and 9, a representative of the Regional Director of the Board, in conjunction with a representative of the Companies, made an extensive inspection and check of the postings, in view of complaints to the Board by the C. I. O., and that the Board's inspector found and reported a substantial and sufficient compliance with its Order as to the postings. The Board reported no insufficiency of compliance, during the thirty days or afterwards; and the C. I. O. has no standing to predicate now a [fol. 37] charge of contempt, on any such insubstantial grounds. What I believe to be the facts as to the Board's checking and verification of compliance are shown in the accompanying affidavit of Charles H. Woods.

IV. Recent Checking and Verification of the Extent of I. B. E. W. Membership Among the Companies

12. About a month after the entry of this Court's Order of January 21, 1939, the I. B. E. W. complained to the Companies that the I. B. E. W. was not being accorded the status to which it was entitled, under Section 9(a) of the Act and the Opinion of the Supreme Court. The I. B. E. W. offered and asked for a complete check of its membership records and dues data, to ascertain the number and percentage of its paid-up members among the employees of the Companies. This proposal was availed of. Under my instructions, the check and verification were made under the supervision of Dr. J. J. Wittmer, Personnel Director, during March of this year, as shown in the accompanying affidavit by Dr. Wittmer. As reported to me on April 7th and under my general instructions, the work was done in the following thorough manner, stated by Dr. Wittmer:

"The check of membership records was completely made by employees of the Personnel and Payroll Departments of the Consolidated Edison Company under my direction. The I. B. E. W. was represented by Mr. W. F. Steinmiller, International Representative, who was present at all times during the count and who coordinated the activities of the various Local Union officers in the presentation of their records for our examination. All handling and examining of records during the investigation was done by the Consolidated Edison employees who individually and collectively can vouch for the work they did and the manner in which it was performed.

"The records submitted by the I. B. E. W. for certification were:

"(1) The dues ledgers of the individual Local Unions.

"(2) The applications for membership, signed by the individual applicants.

"(3) The official receipt books of the Local Unions.

"These records were inspected in the offices of the various Local Unions. Particular care was taken to insure that all records related to bona fide employees.

"The Company's employee record consisted of an alphabetic list, prepared by the Payroll Statistics Bureau, of the employees of each company showing each employee's pay-

roll control number, name and title, as of February 25, 1939. The verification of the I. B. E. W. members as Company employees was made by comparing the signatures on the I. B. [fol. 38] E. W. membership application with the known signature of our employees as found in the Personnel records of the various companies. The signature files used in most instances were the signed Declaration of Residence form filed by each employee for New York State Income Tax purposes for the year 1938. Where no such form existed, reference was made to the employee's signature as found on his employment application or employee record card. The Company records at all times were in the possession of the Company employees making the check and were returned to the Company's premises every evening. The tax forms were used because of the convenience in carrying this material to and from the union offices during the course of the investigation.

"The actual count was made by inspecting each member's dues account as it appeared in the ledgers of his Local. Where the last month for which dues had been paid was September 1938 or later, he was regarded a member and his signature, as it appeared upon his application for membership, was compared with his signature as it appeared on the Company records. Where a similarity existed between these two signatures, it was accepted as an indication that the I. B. E. W. member was our employee of that name and signature and our payroll list was marked accordingly. In those cases where the signatures obviously were not made by the same individual, the indiviiduals were not counted as members. In those cases where an individual appeared on the dues ledger as a member, but whose name did not appear upon our payroll records, he was not regarded as an employee and was not included in our count. We have, during the course of the investigation, maintained a record of these cases and have this information available should it be required.

"In order to establish the validity of the dues ledger records as representing actual payment of cash dues by the member to his Local Union, we made spot checks by comparing the ledger record of approximately every twenty-fifth member with the Local Union receipts to be sure a receipt had been issued to the member. The second copy of this receipt is sent to the International Office together with a

per capita tax of fifty cents (50¢), by the Local Union, while the third copy, which is the one we inspected, remains permanently in the receipt book.

"In order to answer any question that might arise as to the specific material presented by the I. B. E. W., every Union record which we examined was initialed by the individual making the examination."

13. The results of this detailed checking to determine the number and percentage of employees of the Companies who are paid-up members of the seven Local Unions of the I. B. E. W. were reported to me as follows:

"We found 22,152 employees as members of the I. B. E. W. or 62.8 per cent of the 35,239 eligible employees in the Con- [fol. 39] solidated Edison System, as of the time we made this check. In addition, there are 740 employees, or 2.1 per cent, shown on the I. B. E. W. records as members with dues paid, but whose signatures to I. B. E. W. membership cards we have been unable as yet to verify from our own records. With these included, the total I. B. E. W. membership is 22,892, or 64.9 per cent, of the eligible employees. You will recall that at the time the I. B. E. W. presented its membership figures to us in June of 1937, during the hearings before the N. L. R. B., the percentage of eligible employees with dues paid was stated to then be 60 per cent."

Dr. Wittmer submitted to me the following conclusion, from the checking and verification done under his supervision:

"In my judgment, based upon the examination outlined above, the statement of the I. B. E. W. membership by companies, given in the attached tabulation, clearly shows not only that a majority of the employees of the Consolidated Edison System are members of the I. B. E. W., but also that a majority of the eligible employees of each individual company on the System are such members."

A summary showing the ascertained and verified membership of the I. B. E. W. among our employees, by Companies, is hereto annexed as Exhibit "F".

V. Attitude, Policy and Action of the Companies as to Collective Bargaining Matters and the Status of the Amalgamated (C. I. O.)

14. The policy and action of the Companies as to the matters now principally complained of by them were stated in

my letter of February 27, 1939, to President McCurley of the Amalgamated (see Exhibit "B" attached to moving affidavit of A. C. Joy) and Mr. Low's letter of March 6, 1939, to General Organizing Director Straub (see Exhibit "F" attached to A. C. Joy affidavit); and I stand upon those statements of what we have done. For convenience, a correct copy of my letter to President McCurley is hereto annexed as Exhibit "G", and a copy of Mr. Low's letter is hereto annexed as Exhibit "H".

15. The motion here seems to rely largely, for its claim of violation, upon the provisions of present subdivision (f), former sub-division (g), of the Board's Order. Former sub-division (g) requires the Companies to "cease and desist" from "Recognizing the International Brotherhood of Electrical Workers as the exclusive representative of their employees." I have been advised, and in good faith I believe, that the meaning and effect of this former sub-division (g), now (f), are determined and controlled by the interpretation which the Supreme Court placed upon it, in [fol. 40] leaving this sub-division in the Order. The Court said:

"We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act. So construed, that subdivision merely applies existing law."

No majority bargaining agency other than the I. B. E. W. has been established under the Act; and I believe that the I. B. E. W. has at all times since June of 1937 been the bargaining agency selected by a large majority of the employees of the Companies. If the Board's Order is now to be construed, as the C. I. O.'s motion contends, so as to require the Companies to disregard and give no effect to Section 9(a) of the Act or the Supreme Court's interpretation, I can only say that I find no such requirement in the Order and that the Companies have endeavored to comply in good faith with the Act and with the Supreme Court's interpretation of the Order. If the Order is now to be modified and broadened, I submit that any such thing should be done, if at all, by modification in appropriate proceed-

ings rather than by a contempt motion as to an Order which lacks clarity, certainty and definiteness of terms.

16. Neither the Board nor its Regional Director has at any time informed or advised the Companies that the latter were not complying with the Order of this Court. No complaint of violation or proceeding based on violation of the Order of this Court has been initiated by the Board and brought to the attention of the Companies. No one connected with the Amalgamated or the C. I. O. has brought to my attention any of the matters now complained of, other than those considered and replied to in the correspondence above referred to, in which I reiterated my purpose that any claimed violations brought to my attention would be dealt with "promptly and adequately."

VI. Summary of the Charges and Grounds of Motion and Summary of Reply Thereto

17. As I read the motion and accompanying affidavits, substantially the following charges are made by the C. I. O. against the Companies, as basis for a claim of violation of this Court's Order of January 21, 1939:

(1) Principally, that the Companies have continued to bargain collectively with the I. B. E. W. and deal with its Grievance Committees, and have refused to bargain with the C. I. O. or its Grievance Committees, as such.

This charge is true; but we are advised and believe that in view of the selection of the I. B. E. W. by a large majority of our employees, our course is that required by Sec- [fol. 41] tion 9(a) of the National Labor Relations Act and by the Order of the Board as modified and interpreted by the Supreme Court.

(2) That the Companies failed to post and keep posted the Notices to Employees, as required by the Board's Order as granted enforcement by this Court.

This charge is wholly untrue; our compliance as to the Notices was careful and complete; and a representative of the Regional Director visited our premises and checked our compliance, which the Order placed under the administrative supervision of the Regional Director.

(3) That the Companies have permitted officers and

premises, and have refused access to officers and agents of the C. I. O. who were not employees of the Companies.

The policy of these utility Companies has naturally been to exclude from their operating premises (aside from offices to which customers come) persons who are not employees and would take up the time of employees and might more or less disturb operations. Our Contracts with the I. B. E. W. provide that it shall not solicit members on Company property or time. Our policy and effort have been to discourage and prevent the carrying on of labor organization activities on Company premises, and to exclude non-employees. However, inasmuch as we have valid and subsisting Contracts with the I. B. E. W. as the majority labor organization, under which Grievance Committees are constituted for the adjustment of grievances between employees and Management, we have issued limited passes to certain officers of the I. B. E. W., specifically restricted to access for Grievance Committee work and collective bargaining with Management (see copy of card attached to the accompanying affidavit of Patrick McGrath); and I believe this restriction on access has been enforced. As we do not deal with the minority organization, we have issued no passes to its non-employee agents.

(4) That we have granted the request of five of the seven I. B. E. W. Local Unions that we honor payroll deduction authorizations, when signed by their members individually, asking that their dues be deducted on our payrolls.

As shown in the accompanying affidavit by Dr. J. J. Wittmer, the Companies have done this for such labor organ-[fol. 42] izations as have asked for it, without discrimination, and made public announcement of the request of certain Local Unions and the granting of it. Such authorizations by their individual members have been made and signed in a manner conforming to the laws of the State of New York (Personal Property Law, Section 46). No Union of the C. I. O. has asked for a like procedure. It would have been, and would now be, granted on exactly the same basis, if requested. Such a procedure related only to employees who were already members of the Local Union requesting it, and has no operation as to non-members of that Local Union.

(5) That one of the Companies transferred two boiler cleaners from one station to another because of their C. I. O. activities.

This charge is false. The two men were transferred only temporarily, for operating reasons due to particular work, and were returned to their first station as soon as it was finished. Union membership or non-membership had nothing to do with it (see affidavit of Edward C. M. Stahl herewith).

(6) That one of the Companies "used espionage" (detectives), contrary to the Board's Order, to obtain information as to union activities among employees.

Such a charge is false, and is not supported by the one affidavit (Wallace) to which the motion refers. The Wallace affidavit alleges various activities and asserted statements by one Mellet, an employee said to be a shop steward of the I. B. E. W. Mellet is alleged to have made statements about a fellow employee, a supervisor. There is not even hearsay support for a charge of the use of detectives or other espionage.

(7) That at the 1939 annual meeting of the stockholders of the Consolidated Edison Company, I stated or intimated that the Companies have decided or were going to put in force a "closed shop contract" contrary to the Board's Order.

This is complete misrepresentation of what I said. My statements to the stockholders were to the same effect as my letter to the President of the C. I. O. The stenographer's minutes of the stockholders' meeting shows what I said, as follows:

"I want to say that at the present time the company is reviewing the membership of the International Brotherhood of Electrical Workers as to their membership up to date, [fol. 43] and that examination will be completed very shortly, and there is every reason to believe that the proportionate membership as it existed in the beginning exists today. Under those circumstances, where a majority of the eligible employees belong to a proper legal labor organization for collective bargaining, the company is only required to deal with that organization. And we have so notified the C. I. O., that we will not as an organization deal with them.

"I might say for your information that the Company receives the personal complaint or grievance of any individual employee, he can protest anything that he chooses as an individual, and his protest will be received. Where it comes

to a question of dealing collectively the only collective bargaining agency is the International Brotherhood of Electrical Workers."

(8) Generally, that some employees who are members of the I. B. E. W. engaged in various union activities on Company premises, and that like activities by C. I. O. members were interfered with and discouraged, and that some employees exercising in part minor supervisory duties (but usually members of the I. B. E. W.) favored the I. B. E. W. and said or did things to encourage membership in the I. B. E. W.

Such charges are largely hearsay, and in many instances relate to matters alleged to have taken place before January 21, 1939, the date when enforcement became effective. Before that date, the Board's Order had been stayed, first by the Order, and later pursuant to the Rules, of this Court; and our compliance therewith had been without legal compulsion. The instances charged are very few, and affect but few of the 37,000 employees of the Companies. In no case is it claimed that any of these instances were brought to the attention of Mr. Low, Dr. Wittmer, myself, or any other officer of the Companies, although I had written the C. I. O. that I would deal "promptly and adequately" with any instances of violations brought to my attention. In view of the incessant activity of the C. I. O. organizers and the false and malicious character of their many circulars and oral statements, resentment may have been provoked in a number of instances; and perhaps a few individuals, among the employees and in minor supervisory positions, may have said or done things which were contrary to the policy and instructions of Management to discourage and prevent all union activities on Company property and time, by any [fol. 44] labor organization. If many of our employees of many years' service resented the C. I. O. tactics and some of them were unable wholly to conceal a preference for the I. B. E. W., they were only human; but, whatever may have been their individual rights of speech under such circumstances, the Companies and their executive officers have discouraged, and at least have endeavored to minimize, all such discussions among employees on Company property and time. From such information as I from time to time received, I have no doubt that agents and members of the C. I. O. were themselves flagrant and habitual offenders.

We received a number of emphatic protests from the I. B. E. W. that its representatives were denied the privileges claimed to be due them, under Section 9(a) of the National Labor Relations Act, as the organization selected by a large majority of the eligible employees of the Companies, although we have at all times since this Court's enforcement Order of January 21, 1939, and theretofore, endeavored in good faith to observe the Order of the Board as modified and the provisions of the National Labor Relations Act.

The more detailed facts as to each of the above-summarized matters are stated in the accompanying affidavits, which answer the principal mis-statements of fact in the moving affidavits. In a few instances, due to illness or absences, answering affidavits have not been obtainable in the short available time. By failing to submit answering affidavits under such circumstances, the Companies do not admit the allegations of the moving affidavits, but will ask leave to supply affidavits later, as to any matters which are material.

F. L. Carlisle

Subscribed and sworn to this 22nd day of May, 1939.
D. M. Newman, Notary Public, Kings County.

[fol. 45] EXHIBIT "A" (ATTACHED TO AFFIDAVIT OF FLOYD L. CARLISLE): TYPICAL CONTRACT BETWEEN I. B. E. W. AND THE COMPANIES

Memorandum of Agreement Between Consolidated Edison Company of New York, Inc., and the International Brotherhood of Electrical Workers Through Its Local Union No. B829

Effective June 15th, 1937

[fol. 46] Agreement between Consolidated Edison Company of New York, Inc. (hereinafter referred to as the "Edison Company"), and the International Brotherhood of Electrical Workers (hereinafter called the "Brotherhood"):

Witnesseth: That for the purpose of entering into such a basic agreement as to rates of pay, hours of work, and

conditions of employment, and as to the methods of conducting collective bargaining between the parties as to questions which may from time to time arise, as will best promote and improve the economic welfare of employees of the Edison Company who are members of the Brotherhood and enable the Edison Company efficiently and economically to perform its obligations as a public utility and to furnish uninterrupted electric service in its territory, the parties hereto agree with each other as follows:

Article I

Scope

1. This agreement shall apply to all employees of the Edison Company who are members of the Brotherhood and are engaged in operations essential to the furnishing of electric service to consumers, including meter readers, elevator operators, and other building employees, but not including general foremen or supervisors in charge of any classes of labor, watchmen, or temporary employees.

Article II

No Discrimination

2. The Edison Company recognizes the Brotherhood as the collective bargaining agency for those employees who are members of the Brotherhood. The Edison Company [fol. 47] recognizes, and will not interfere with, the right of its employees to become members of the Brotherhood, and agrees that there shall be no discrimination, interference, restraint or coercion, by the Edison Company, or any of its agents, against any employee because of his membership in the Brotherhood. The Brotherhood agrees, for itself and its members, not to intimidate or coerce employees into membership in the Brotherhood and also agrees not to solicit membership on Edison Company time or property.

Article III

Hours and Working Conditions

3. Effective as of the date of this agreement, there shall be maintained a working day of not more than eight (8) hours and a working week of not more than forty (40) hours. Time and a half shall be paid for all overtime in ex-

cess of eight (8) hours on any day and for all overtime in excess of forty (40) hours in any one week, provided that no employee shall be paid both daily and weekly overtime on account of the same hours of overtime work. In departments which are, at the time of this agreement, operating with a working day of less than eight (8) hours or a working week of less than forty (40) hours (to wit, on either thirty-five hours per week or thirty-seven and one-half hours per week), time and a half shall correspondingly be paid for time worked in excess of the standard work-day and work-week in such departments.

4. Work by employees on holidays (January 1st, February 12th, February 22nd, May 30th, July 4th, Labor Day, October 12th, Election Day, November 11th, Thanksgiving Day, and December 25th) shall be limited to that which is deemed by the Edison Company to be essential to its performance of its obligations to furnish adequate and continuous service to consumers. An employee required to work on a holiday shall receive his regular holiday pay and, in addition, shall receive time-and-one-half for time actually worked and in no case less than four hours' overtime. An employee not required to work on a holiday which falls on any one of the days in his regular scheduled work week shall be allowed full pay for such holiday.

Article IV

Vacations

5. Each employee who was in the employ of the Edison Company or any other Company of the Consolidated Edison System on September 1, 1936, shall receive two weeks' vacation with pay, such vacation to be taken in a single period. [fol. 48] Each employee who became such after September 1, 1936, but before January 1, 1937, shall receive one week's vacation with pay, to be taken in a single period. Vacation pay for an employee shall be at the rate of pay applicable to him for his standard work-week, at the time such vacation commences.

Rider

Correcting Article IV, Section 5

Vacations

Article IV, Section 5, of the contract to which this Rider

weeks' vacation with pay shall apply to employees who were in the employ of the Company on August 31, 1936, instead of September 1, 1936, and the one week vacation with pay to employees employed subsequent to August 31, 1936 and prior to January 1, 1937.

Executed, June 15th, 1937.

{ J. J. D. / W. J. E. / E. F. G. / D. W. T. } { R. H. T. / C. M. B. Jr. }

6. The vacation of an employee will, so far as practicable, be granted at the time requested by him; but the final right to allot vacation periods is reserved exclusively to the Edison Company, in order to insure orderly operation and adequate and continuous service to the public.

Article V

Wages and Classifications

7. The wages and classifications in effect at the date of signing this contract shall continue in effect during the life of the contract, and in addition thereto there shall be an increase of five per cent (5%) in the wages, to be made effective July 1, 1937, of all employees receiving less than Five thousand dollars ($5,000.00) per annum, with the exception of those who have received increases between January 1, 1937, and July 1, 1937. Where increases have been made since January 1, 1937, which were less than five per cent (5%), they will be increased to equal five per cent (5%).

[fol. 49]

Rider

to Article V, Section 7

Wages and Classifications

Article V, Section 7, of the contract to which this Rider is annexed, is hereby amended to provide that all employees receiving less than $40.00 per week and entitled to 5% increase under Article V, Section 7, shall receive, in lieu thereof, an increase of $2.00 per week; and to provide further that employees who are not entitled to a 5% increase

under Article V, Section 7, because they have received increases since January 1, 1937, shall receive an increase of $1.00 per week; and to provide further that all increases provided under Article V, Section 7, and this Rider, shall be effective for the payroll week commencing July 4, 1937.

Executed June 15th, 1937.

Consolidated Edison Company of New York, Inc., by R. H. Tapscott, President; International Brotherhood of Electrical Workers, by D. W. Tracy, International President; Attest: C. M. Breidenbach, Jr., Assistant Secretary; Local Union No. B829, Joseph J. Delvac, Wm. J. Eitelbach, E. F. Galschjodt.

Article VI

Provisions for Sickness, Disability, Superannuation, Retirement, etc.

8. The Edison Company will continue in force, for the duration of this agreement but without commitment or liability thereafter, substantially its present system and provisions for the welfare of employees, including the Green Mountain Lakes Farm, Inc., the present medical services, Company's sickness allowances, and all Mutual Aid benefits, the Savings and Loan Association, the allowances for jury duty and military duty, and group insurance. The Edison Company will continue to comply with the United States Social Security Act while this agreement is in effect, unless the Act is meanwhile adjudged to be invalid or inapplicable to such an employer. The Edison Company further states (but without modifying the voluntary and non-obligatory character of its Provisional Retirement Plan for Employees) its present intention to continue for the term of this contract its said Provisional Retirement Plan for Employees as now maintained.

[fol. 50]

Article VII

Lay-offs, Promotions and Demotions

9. It is understood and agreed that in all cases of promotion or demotion of employees from one classification to another, or of increase or decrease of forces, the follow-

ing factors shall be considered, and that where factors (b), (c) and (d) are relatively equal, the length of continuous service shall govern:

(a) Length of continuous service;
(b) Knowledge, training, ability, skill and efficiency;
(c) Physical fitness;
(d) Family status, number of dependents, etc.

10. The Edison Company has the right to lay off or discharge any employee for sufficient and reasonable cause; but the employee or his representative shall, upon request, be advised of the reason or reasons for such lay-off or discharge.

Article VIII

Safety

11. The Edison Company shall continue to make reasonable provisions for the safety and health of its employees during the hours of their employment. Protective devices, wearing apparel, and other equipment, necessary for the proper protection of employees in any department from injury, shall be provided by the Edison Company in accordance with the practice now prevailing in such department.

Article IX

Management

12. The supervision and control of all operations and the direction of all working forces, including the right to hire, suspend or discharge for proper cause, or to transfer employees, or to relieve employees from duty, because of lack of work or for other legitimate reasons, are vested exclusively in the Edison Company, provided that this will not be used for purposes of discrimination against any member of the Brotherhood.

Article X

Adjustment and Arbitration

13. Should any labor dispute or difference arise between the Edison Company and the Brotherhood or its members employed by the Edison Company, as to the meaning, application or operation of any provision of this agreement, [fol. 51] such dispute or difference shall be settled forthwith

in the following manner, and there shall be no quitting or suspension of work by any member of the Brotherhood during or on account of such dispute or difference:

First: Between the aggrieved employee, who is a member of the Brotherhood, and the foreman of the department involved;

Second: Between a member or members of the grievance committee designated by the Brotherhood, and the foreman and superintendent of the department;

Third: Between a member or members of the grievance committee designated by the Brotherhood, and the general superintendent or manager of the Company or Division involved;

Fourth: Between the representatives of the National organization of the Brotherhood and the representatives of the executives of the Edison Company; and

Fifth: In the event that such dispute or difference is not settled, promptly and to the satisfaction of the parties, through one of the methods above-provided, the dispute or difference shall then be submitted immediately to a board of three members, of which board one member shall be designated by the Edison Company and one member by the Brotherhood, the third and impartial member to be designated by agreement between the other two members. In the event that these two members fail to agree upon the third member within ten days after the designation of the other two members, either the Brotherhood or the Edison Company may ask The Governor of the State of New York to designate such third member of the board; and the member so designated by The Governor shall complete the board. The decision of a majority of the members of the board shall be final and binding upon the Edison Company, and upon the Brotherhood and its members, for the duration of this agreement.

14. Specified periods shall be agreed upon between the grievance committee and the general superintendent or manager of the Company or the Division thereof involved, for the presentation of grievances hereunder; provided, however, that matters pertaining to discharges or other matters which cannot reasonably be delayed until the time of the

next regular meeting may be presented at any time in accordance with the foregoing provision.

[fol. 52] 15. The grievance committee for each department shall consist of not less than three employees of that department, and not more than five such employees, designated by the Brotherhood, who will be afforded such time off, without pay, upon reasonable notice to their department head, as may be required:

First, to attend regularly scheduled meetings of such grievance committee;

Second, to attend meetings pertaining to discharges or other matters which cannot reasonably be delayed until the time of the next regular meeting;

Third, to visit departments other than his own, at any reasonable times, for the purpose of transacting the legitimate business of the grievance committee, after notice to and permission from his department superintendent or his designated representative, and upon notice to the department head of each department to be so visited.

Article XI

Right of Review of Discharge

16. In the event an employee is discharged from his employment from and after the date hereof and he believes that he has been unjustly dealt with, such discharge shall constitute a dispute or difference for determination under the method of adjusting grievances hereinbefore provided.

17. In the event that it is decided, in the manner provided in this agreement, that such discharge was wrongful and without just cause, the Edison Company shall reinstate such employee and pay to him full compensation at his regular rate for the time lost. All such cases of discharge shall be taken up and disposed of within five (5) days from the date of discharge, unless reference to a board of arbitrators is invoked.

Article XII

Future Negotiations and Outlawing of Strikes and Lockouts

18. Joint conferences between representatives of the Edison Company and of the Brotherhood shall commence, in the City of New York, on May 1, 1938, for the purpose of

negotiating an agreement with regard to wages, hours, working conditions, and any other provisions of this agreement, to take effect upon the expiration of this agreement. The representatives of the parties hereto shall give due weight [fol. 53] in such negotiations to the relatively high degree of continuity of employment which the Edison Company has been able (and hopes in the future to continue to be able) to secure to its employees in the regular operating departments of the enterprise, save such construction or other types of work as are in their nature seasonal or sporadic, and to the fact that the Edison Company is a regulated public utility under the public obligation to operate efficiently and economically and to maintain adequate and continuous service, and, as such a public utility, is unable to increase its rates and charges for services rendered consumers unless and until it secures the favorable action of the Public Service Commission of the State of New York according to law. In the event the conferees should be unable to agree, the issues in dispute shall be disposed of by decision of a board of arbitrators, selected as provided in Paragraph 13, subparagraph Fifth above, and there shall be no cessation or stoppage of work, service or employment, on the part of or at the instance of either party, because of or during such disagreement.

Article XIII

Duration of Agreement

19. This agreement shall remain in full force from the date of the signing hereof until June 30, 1938, and from year to year thereafter until either party notifies the other party, not less than thirty (30) days prior to the expiration of this agreement or of any extension thereof, of its desire to terminate the same.

In Witness Whereof, Consolidated Edison Company of New York, Inc., and the Brotherhood and its Local Union have executed this agreement the 15th day of June, 1937.

Consolidated Edison Company of New York, Inc., by R. H. Tapscott, President; International Brotherhood of Electrical Workers, by D. W. Tracy, International President; Attest: C. M. Breidenbach, Jr., Assistant Secretary; Local Union No. B829, Joseph J. Delvac, Wm. J. Eitelbach, E. F. Galschiodt

[fol. 54] EXHIBIT "B" (ATTACHED TO AFFIDAVIT OF FLOYD L. CARLISLE): PRELIMINARY NOTIFICATION OF COMPLIANCE WITH THE BOARD'S ORDER AS MODIFIED

UNITED STATES OF AMERICA

before the

NATIONAL LABOR RELATIONS BOARD

Case C-245

IN THE MATTER OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its Affiliated Companies, Brooklyn Edison Company, Inc., New York and Queens Electric Light and Power Company, The Yonkers Electric Light and Power Company, New York Steam Corporation, Consolidated Telegraph and Electrical Subway Company, Westchester Lighting Company

and

UNITED ELECTRICAL AND RADIO WORKERS OF AMERICA, Affiliated with the Committee for Industrial Organization

To the Regional Director of the National Labor Relations Board, for the Second Region:

Pursuant to the Order of the National Labor Relations Board dated November 10, 1937, as modified by the Supreme Court of the United States on December 5, 1938, and the final decree entered upon the mandate of the Supreme Court dated January 12, 1939, by the United States Circuit Court of Appeals for the Second Circuit on January 21, 1939, You are Hereby Notified as follows:

The respondent Companies are thereby required, within ten (10) days from the service upon them (or their attorneys) of a copy of the final decree of the Circuit Court of Appeals, which was served on January 31, 1939, to notify you in writing as to "what steps the respondents have taken to comply therewith."

(1) The respondents have been and are complying in all respects, without prejudice and subject to full reservation of their rights, with the provisions of Paragraph "1" of

the Board's Order of November 10, 1937, as modified by the Supreme Court of the United States.

(2) In advance of the coming down of the mandate of the Supreme Court on January 12, 1939, and the entry of a final decree thereon on January 21, 1939, the respondents Consolidated Edison Company of New York, Inc., and New York and Queens Electric Light and Power Company [fol. 55] on or about December 22, 1938, made payments, without prejudice, of substantially more than half of the sums awarded as "back pay" to each of the six men specified in Paragraphs "2a" and "2b" of the Board's Order; and thereafter as soon as the requisite computations of net balances remaining payable on the awards had been made and approved in behalf of the Board, the named respondents made on or about January 17, 1939, the final payments on the awards to such persons, thereby completing such payments of the awards before the entry of the final decree of the Circuit Court of Appeals.

(3) Furthermore, in pursuance of Paragraph "2a" of the Board's Order, the respondents Consolidated Edison Company of New York, Inc., and New York and Queens Electric Light and Power Company on or about January 16, 1939, duly notified each of the six men therein named that they might return to work on the following Monday, January 23, 1939. Each of the six men reported for work on that date, and were reinstated in active employment, and are at work as employees of the respondents, without prejudice to their seniority rights and other privileges. This notification was given prior to the entry of the final decree of the Circuit Court of Appeals.

(4) Paragraph "2c" of the Board's Order requires the respondents to post, and to keep posted for thirty (30) days, in conspicuous places through their offices, buildings, plants, and other places of employment, notices containing and stating the matters and things enumerated and stated by the Board in such Paragraph "2c", which was not specifically amended by the decision of the Supreme Court. The respondents have been and are willing to comply fully with Paragraph "2c" of the Board's Order, but the matter has been and is held in abeyance, without prejudice to the respondents' rights, to permit the consideration of sundry

suggestions of counsel for the C. I. O. that the form of notice should be supplemented and substantially varied from that specified in Paragraph "2c" of the Board's Order. Any delay in this respect has been and is in no way the fault of the respondent Companies or their counsel. Promptly after the matter has been considered by general counsel for the Board, the respondents will print and post the notices, in the form and substance prescribed by the Board's Order or in such variant form as may be agreed upon by the respondents with the Board. As soon as the notices have been printed and posted, the respondents will notify you further; but under the circumstances they have not wished to defer notification of their compliance in other [fol. 56] respects with the Board's Order as amended by the Supreme Court of the United States.

New York, February 1, 1939.

Respectfully submitted, Consolidated Edison Company of New York, Inc., by A. Augustus Low, Vice President; Brooklyn Edison Company, Inc., New York and Queens Electric Light and Power Company, Westchester Lighting Company, The Yonkers Electric Light and Power Company, New York Steam Corporation, Consolidated Telegraph and Electrical Subway Company.

State of New York,
County of New York, ss:

A. Augustus Low, being duly sworn, says: I am a Vice President of the Consolidated Edison Company of New York, Inc., and Brooklyn Edison Company, Inc. In the course of my duties as such Vice President, I have been and am familiar with the matters and things referred to in the above-stated notification to the National Labor Relations Board. I have read the foregoing notification, and know the contents thereof. The same is true to the best of my knowledge, information and belief.

A. Augustus Low.

Subscribed and sworn to before me this 1st day of February, 1939. D. M. Newman, Notary Public, Kings County.

[fol. 57] EXHIBIT "C" (ATTACHED TO AFFIDAVIT OF FLOYD L. CARLISLE): NOTIFICATION OF COMPLETION OF COMPLIANCE WITH THE BOARD'S ORDER AS MODIFIED

UNITED STATES OF AMERICA

before the

NATIONAL LABOR RELATIONS BOARD

Case C-245

In the Matter of Consolidated Edison Company of New York, Inc., and its affiliated Companies Brooklyn Edison Company, Inc., New York and Queens Electric Light and Power Company, Westchester Lighting Company, The Yonkers Electric Light and Power Company, New York Steam Corporation, Consolidated Telegraph and Electrical Subway Company,

and

United Electrical and Radio Workers of America, affiliated with the Committee for Industrial Organization

To the Regional Director of the National Labor Relations Board, for the Second Region:

Referring further to the notification sent to you on February 1, 1939, and pursuant to the Order of the National Labor Relations Board dated November 10, 1937, as modified by the Supreme Court of the United States on December 5, 1938, and the final decree entered upon the mandate of the Supreme Court dated January 12, 1939, by the United States Circuit Court of Appeals for the Second Circuit on January 21, 1939, you are hereby notified as follows:

Complying with Paragraph 2c of the Board's Order, the respondent Companies have this day posted on bulletin boards and other conspicuous places through their offices, buildings, plants, and other places of employment, notices stating each of the matters and things set out in Paragraph 2c of the Board's Order, of which notice a copy is hereto annexed, in the form posted by the Consolidated Edison Company of New York, Inc. This form of notice, with variance as to the name of the Company, has been posted by each of the undersigned Companies. Such notices will

remain posted during at last thirty consecutive days. The circumstances under which the notices have not been put up sooner are known to you.

Supplementing the notification given you on February 1, 1939, the undersigned Companies hereby notify you that [fol. 58] they have now complied with the Board's Order as modified, and will continue to comply therewith.

February 20, 1939.

Respectfully submitted, Consolidated Edison Company of New York, Inc. By (Signed) A. Augustus Low, Vice President; Brooklyn Edison Company, Inc.; New York and Queens Electric Light and Power Company; Westchester Lighting Company; The Yonkers Electric Light and Power Company; New York Steam Corporation; Consolidated Telegraph and Electrical Subway Company.

State of New York,
County of New York, ss:

A. Augustus Low, being duly sworn, says: I am a Vice President of the Consolidated Edison Company of New York, Inc., and Brooklyn Edison Company, Inc. In the course of my duties as such Vice President, I have been and am familiar with the matters and things referred to in the above-stated notification to the National Labor Relations Board. I have read the foregoing notification, and know the contents thereof. The same is true to the best of my knowledge, information and belief.

(Signed) A. Augustus Low.

Subscribed and sworn to before me this 20th day of February, 1939. D. M. Newman, Notary Public Kings County.

Form of Notice Annexed

[fol. 59] Exhibit "D" (Attached to Affidavit of Floyd L. Carlisle): Notice to Employees

Notice to Our Employees

Paragraph 1 of the Order of the National Labor Relations Board dated November 10, 1937, as modified accord-

ing to the Opinion and Mandate of the Supreme Court of the United States and the Final Decree of Enforcement entered by the United States Circuit Court of Appeals for the Second Circuit, provides as follows:

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondents, Consolidated Edison Company of New York, Inc., and its affiliated Companies: Brooklyn Edison Company, Inc., New York and Queens Electric Light and Power Company, Westchester Lighting Company, The Yonkers Electric Light and Power Company, New York Steam Corporation, Consolidated Telegraph and Electrical Subway Company, their officers, agents, successors, and assigns shall:

1. Cease and desist from:

a. Discouraging membership in United Electrical and Radio Workers of America or any other labor organization of their employees, or encouraging membership in International Brotherhood of Electrical Workers or any other labor organization of their employees, by discharging or refusing to reinstate any of their employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment because of membership or activity in connection with any such labor organization;

b. Urging, persuading, warning, or coercing their employees to join International Brotherhood of Electrical Workers, or any other labor organization of their employees, or threatening them with discharge if they fail to join any such labor organization;

c. Permitting organizers and collectors of dues for International Brotherhood of Electrical Workers or any other labor organization to engage in activities among their employees in behalf of such labor organizations during working hours or on the respondents' property, unless similar privileges are granted to United Electrical and Radio Workers of America and all other labor organizations of their employees;

d. Permitting their employees who were officials of the Employees' Representation Plans to use the respondents'

time, property and money in behalf of International Brotherhood of Electrical Workers or any other labor organization of their employees;

e. Employing detectives to investigate the activities of their employees in behalf of United Electrical and Radio Workers of America or any other labor organization of their employees or employing any other form or manner of espionage for such purposes;

f. Recognizing the International Brotherhood of Electrical Workers as the exclusive representative of their employees;

g. In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection.

Notice to Employees

The undersigned Company, in accordance with the Order of the National Labor Relations Board dated November 10, 1937, as modified by the decree of enforcement entered by the United States Circuit Court of Appeals for the Second Circuit on January 21, 1939, pursuant to the Opinion and Mandate of the Supreme Court of the United States, does hereby, on behalf of itself and its officers, agents, successors and assigns, notify its employees as follows:

I. The Order of the National Labor Relations Board dated November 10, 1937, as modified by the decree of enforcement entered by the United States Circuit Court of Appeals for the Second Circuit on January 21, 1939, pursuant to the Opinion and Mandate of the Supreme Court of the United States, has thereby been granted enforcement, and is binding upon the undersigned Company. A copy of Paragraph 1 of the Board's Order as so modified is herewith posted, as a part of this notice. The Company will cease and desist in the manner aforesaid, and will abide the Order and comply therewith.

II. The employees of the undersigned Company are free to join or assist any labor organization for the purposes of

collective bargaining with the Company. The Company will bargain collectively with any labor organization entitled thereto, and will not discharge, or in any manner discriminate against, members of United Electrical and Radio Workers of America, or any other labor organization of its employees, or any person assisting such organization, by reason of such membership or assistance. The Company will not discharge, or in any manner discriminate against, any employee for refusal or failure to join or assist International Brotherhood of Electrical Workers or any other labor organization of its employees.

This notice will remain posted during at least thirty consecutive days from the date of posting. February 20, 1939.

Consolidated Edison Company of New York, Inc.

[fol. 60] EXHIBIT "E" (ATTACHED TO AFFIDAVIT OF FLOYD L. CARLISLE): NOTICE TO EMPLOYEES

To Our Employees

The Order of the National Labor Relations Board as to this Company having been modified in the respect hereinafter stated, and in other respects upheld, by the Opinion and Mandate of the Supreme Court of the United States and the final decree thereupon entered by the United States Circuit Court of Appeals for the Second Circuit, the undersigned Company has duly notified the Board that the Company has complied, and will continue to comply, with such Order as so modified.

The Opinion of the Supreme Court said that "We conclude that the Board was without authority to require the petitioning Companies to desist from giving effect to the Brotherhood Contracts", one of which is in force between the undersigned Company and the International Brotherhood of Electrical Workers; and the Court modified the Board's Order by striking out the provision which would have in effect abrogated those Contracts. Concerning the effect of former sub-division (g), which is now sub-division (f) of the Board's Order as so modified, the Supreme Court said:

"Subdivision (g) of that paragraph, requiring the Companies to cease recognizing the Brotherhood 'as the

exclusive representative of their employees', stands on a different footing. The contracts do not claim for the Brotherhood exclusive representation of the Companies' employees but only representation of those who are its members, and the continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of 'representation' should arise. Section 9. We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act. So construed, that subdivision merely applies existing law."

For further details of the decision of the Supreme Court, reference should be made to the Opinion of the Court, of which a copy in full has been previously furnished you.

The collective bargaining Contracts between this Company and the International Brotherhood of Electrical Workers and its Local Unions are in full force and effect, and will be observed by the Company in accordance with the foregoing.

February 20, 1939.

Consolidated Edison Company of New York, Inc.

International Brotherhood of Electrical Workers Membership

In

Consolidated Edison Company of New York, Inc., and Affiliated Companies
Determined from Review of Membership Records
Locals B825, B826, B828, B829, B830, B832 and B839
During March, 1939

Company	Total number of employees	Not eligible	Balance eligible	Members	%	Members with dues paid but signatures not available for verification: Number	Members with dues paid but signatures not available for verification: %	Total percentage including unverified signatures
Consolidated Edison Company of New York, Inc.	22,050	1,050	21,000	12,150	57.8	716	3.4	61.2
Brooklyn Edison Company, Inc.	6,531	318	6,213	4,561	73.5	...	...	73.5
New York and Queens Electric Light and Power Company	3,427	165	3,262	2,246	68.9	15	0.5	69.4
Westchester Lighting Company and The Yonkers Electric Light and Power Company	2,914	217	2,697	1,616	59.9	4	0.1	60.0
New York Steam Corporation	1,001	55	946	766	81.0	5	0.5	81.5
Consolidated Telegraph and Electrical Subway Company	1,136	15	1,121	813	72.5	...	...	72.5
Totals	37,059	1,820	35,239	22,152	62.8%	740	2.1%	64.9%

[fol. 62] EXHIBIT "G" (ATTACHED TO AFFIDAVIT OF FLOYD L. CARLISLE): LETTER FROM MR. CARLISLE TO PRESIDENT OF AMALGAMATED FEBRUARY 27, 1939

Consolidated Edison Company of New York, Inc.

Office of Chairman of Board

February 27, 1939.

Mr. John McCurley,
147 Fourth Avenue,
New York City.

DEAR SIR:

Your letter of February 23rd has been received and seems to warrant a reply, in order that you may understand the position of the Companies with which I am identified, as well as the situation presented by your letter.

A very substantial majority of the employees of the Companies of the Consolidated Edison Company group are evidently members of the I. B. E. W. We have been notified to that effect, and are engaged in checking and verifying the membership figures; but the claimed majority seems to be so substantial as to leave no room for doubt as to the free selection and choice of a collective bargaining agency made by a large majority of our employees.

Section 9(a) of the National Labor Relations Act provides, as you know:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

If you have any grounds for claiming that your labor organization has as its members a majority of our employees, we shall be glad to have you submit your data for checking and verification in the same manner in which the I. B. E. W. has submitted its records. So far as can be inferred

[fol. 63] from anything which has been brought to our attention, your organization has only a very small number of our employees as members; and the activities of your organization appear to be conducted largely by persons who are not employees.

Obviously, you cannot in fairness expect these Companies to disregard the selection made by a large majority of their employees, or to undertake to bargain or deal also with a small, perhaps negligible, minority. Our wage scales under subsisting contracts with the I. B. E. W., which the Supreme Court upheld against your attacks, are higher than in other employments. Our scales of old-age, disability and retirement payments are much higher than those prescribed by Federal and State authority. Our responsibility is to the State and City of New York and to our customers, for the furnishing of adequate and economical service without interruption; and the claims of rival labor organizations cannot be permitted to endanger the fulfillment of that responsibility.

These Companies have always permitted and encouraged individual employees and groups of individual employees, as such, to present any grievances freely to management; and there has been and will be no abandonment or limitation of this practice, irrespective of the labor organization to which the employees do or do not belong. Any grievances presented by individual employees, singly or in groups, will be considered and dealt with on their merits, as we have always done. Members of your organization have and may exercise, as individual employees, the same rights in this respect as other employees have, under the proviso in Section 9(a) of the Act.

Your letter stresses and underlines the provision of present sub-division (f), which formerly was sub-division (g), of the Order of the National Labor Relations Board. The Opinion of the Supreme Court stated, as to this sub-division:

"• • • We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act. So construed, that subdivision merely applies existing law."

These Companies believe that they are in all respects complying in good faith with the Order of the National Labor Relations Board as modified by the Supreme Court, including present sub-division (f) as interpreted by the Supreme Court. If any violation of the Board's Order or of the [fol. 64] National Labor Relations Act comes to our attention, we shall deal with it promptly and adequately. At the same time, we have to take account of the fact that the labor organization selected by a large majority of our employees has notified us that we should not violate Section 9(a) of the Act at the instance of any other organization.

Under all of the circumstances above indicated, we see no reason for a conference with you as to the "representation" of our employees, in disregard of the majority selection.

Very truly yours, (sgd.) F. L. Carlisle, Chairman of Board.

[fol. 65] EXHIBIT "H" (ATTACHED TO AFFIDAVIT OF FLOYD L. CARLISLE): LETTER FROM A. A. LOW TO HAROLD J. STRAUB OF THE AMALGAMATED—MARCH 6, 1939

March 6–1939.

Mr. Harold J. Straub,
147 Fourth Avenue,
New York, N. Y.

DEAR SIR:

Your letters of February 23rd and March 1st have been received. No reason appears for issuing to you, a former employee, a pass or permit for entrance to the properties of the Companies. Your letters are wrong on the facts which they attempt to state.

Under our Contracts in force with the labor organization selected by a large majority of our employees, the representatives of the I. B. E. W. are not permitted to solicit members, collect dues, or carry on organizing work, on Company property. For some time, non-employee representatives of the majority organization have understood that their admission to Company premises, aside from conference with Company executives at 15th Street on collective bargaining matters, is only for conference with employees on Grievance Committee matters pursuant to the I. B. E. W. contracts in force. If this limitation should be vio-

lated by any of them, his privilege to enter Company premises will be revoked. To deny them access to their Grievance Committee members would impair the representation of their members by the majority agency and frustrate the adjustment of grievances.

We have long permitted and encouraged our employees, individually or in groups, to present any grievances freely to the management; and we contemplate no departure from that practice. Their full exercise of that privilege does not call for the issuance of a pass or permit for any non-employee to enter Company premises for organizing work or for any other purpose. We believe that nothing in the Order of the N. L. R. B. commands an exception in your favor.

Very truly yours, (sgd.) A. A. Low.

AAL-MG.

[fol. 65½] [File endorsement omitted.]

[fol. 66] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

RESPONSE OF NATIONAL LABOR RELATIONS BOARD TO MOTION BY AMALGAMATED UTILITY WORKERS TO PUNISH CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. AND ITS AFFILIATED COMPANIES FOR CONTEMPT OF COURT

Comes now the National Labor Relations Board, by its attorneys, and, for the information of the Court, states its position on the motion made by Amalgamated Utility Workers to punish the Consolidated Edison Company of New York, Inc. and its Affiliated Companies for contempt of court, as follows:

[fol. 67] 1. Upon examination of the affidavits filed in support of the motion, the Board suggests that sufficient cause has been shown to warrant an appropriate investigation, pursuant to order of this Court, concerning whether Consolidated Edison Company of New York, Inc. and its Affiliated Companies have committed acts in violation of the decree of this Court entered March 21, 1938, as modified by the order of this Court entered January 21, 1939.

2. The Board stands prepared to participate in such investigation as this Court may deem appropriate and herewith offers its services in such capacity as the Court may direct by its order.

Wherefore, the Board respectfully suggests that the Court make and enter herein an order directing that such investigation be held as the Court may deem appropriate in the premises.

Charles Fahy, General Counsel; Robert B. Watts, Associate General Counsel, National Labor Relations Board.

Dated at Washington, D. C., this 13th day of May, 1939.

[fol. 68] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. Thomas W. Swan, Hon. Augustus N. Hand, Hon. Robert P. Patterson, Circuit Judges.

CONSOLIDATED EDISON COMPANY OF NEW YORK, et al., Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, et al., Respondents

ORDER DENYING MOTION—Filed June 2, 1939

A motion having been made herein by counsel for Amalgamated Utility Workers for an order adjudging Consolidated Edison Company of New York, Inc., and its Affiliated Companies, and others, in contempt of this court;

Upon consideration thereof it is

Ordered that said motion be and hereby is denied, upon the ground that the moving party has no standing to make said motion.

Wm. Parkin, Clerk.

[fol. 69] [File endorsement omitted.]

[fol. 70] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 71] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

PRAECIPE FOR RECORD—Filed Aug. 30, 1939

SIRS:

Please Take Notice that respondents International Brotherhood of Electrical Workers, International Brotherhood of [fol. 72] Electrical Workers, Local Union No. B-825; International Brotherhood of Electrical Workers, Local Union No. B-839; International Brotherhood of Electrical Workers, Local Union No. B-832; International Brotherhood of Electrical Workers, Local Union No. B-826; International Brotherhood of Electrical Workers, Local Union No. B-828; International Brotherhood of Electrical Workers, Local Union No. B-829; and International Brotherhood of Electrical Workers, Local Union No. B-830 designate the following portions of the record in this cause and request that they be incorporated into the transcript of record to be certified by the Clerk of this Court, and printed, on the application of Amalgamated Utility Workers to the Supreme Court of the United States for a writ of certiorari to review an order made by the United States Circuit Court of Appeals for the Second Circuit made on or about June 2, 1939, which denied the movant's motion for an order adjudging Consolidated Edison Company of New York, Inc., et al., in contempt of Court, etc., to wit:

Notice of motion served by solicitors for International Brotherhood of Electrical Workers, et al., dated May 18, 1939.

Dated New York, N. Y., August 29, 1939.

Yours, etc., Isaac Lobe Straus, Delafield, Marsh, Porter & Hope, and Claude A. Hope, Solicitors for International Brotherhood of Electrical Workers, et al., 20 Exchange Place, New York City.

[fol. 73] To William Parkin, Esq., Clerk of the United States Circuit Court of Appeals for the Second Circuit, Federal Building, Foley Square, New York, N. Y.

Boudin, Cohn & Glickstein, Esqs., Solicitors for Amalgamated Utility Workers, 20 West 43rd Street, New York, N. Y.

Whitman, Ransom, Coulson & Goetz, Esqs., Solicitors for Consolidated Edison Company of New York, Inc., et al., 40 Wall Street, New York City.

Charles Fahy, Esq., General Counsel, National Labor Relations Board, Shoreham Building, Washington, D. C.

Allan Perl, Esq., Acting Regional Attorney, National Labor Relations Board, Woolworth Building, New York City.

[fol. 74] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

NOTICE OF MOTION TO DISMISS

SIRS:

Please Take Notice, that at a term of this Court to be held in the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the [fol. 75] 22nd day of May, 1939, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, the undersigned, in behalf of International Brotherhood of Electrical Workers; International Brotherhood of Electrical Workers, Local Union No. B-825, International Brotherhood of Electrical Workers, Local Union No. B-839; International Brotherhood of Electrical Workers, Local Union No. B-832; International Brotherhood of Electrical Workers, Local Union No. B-826; International Brotherhood of Electrical Workers, Local Union No. B-828; International Brotherhood of Electrical Workers, Local Union No. B-829; and International Brotherhood of Electrical Workers, Local Union No. B-839, the said International Brotherhood of Electrical Workers and each and all of its said Local Unions aforesaid being affiliates of the American Federation of Labor, will move, preliminarily to the hearing of the motion of the Amalgamated Utility Workers, that the petition and motion of Amalgamated Utility Workers, affiliated with the Utility Workers Organizing Committee, Congress of Indus-

trial Organizations, and all proceedings herein thereon, be Dismissed, upon the grounds:

(1) That the Amalgamated Utility Workers has no standing, under the National Labor Relations Act or otherwise, to institute and maintain the proceeding and motion as set forth in the notice of motion and petition of the Amalgamated Utility Workers;

(2) That the motion papers fail to show whether the motion and the proceeding are prosecuted by the Amalgamated Utility Workers as in the nature of a civil con-
[fol. 76] tempt or a criminal contempt; that the facts alleged in the motion papers and accompanying affidavits do not state and support a charge of either a civil contempt or a criminal contempt, against the employers named; and that neither the motion nor the accompanying affidavits shew or allege facts which would establish that any damages were suffered by the complaining labor organization, so as to support a finding of civil contempt;

(3) That the matters and things stated in the motion and accompanying affidavits are not of judicial cognizance upon the facts alleged and at this time;

(4) That the motion is in disregard of the Opinion of the Supreme Court of the United States on December 6, 1938, in the review proceedings in which the motion is entitled and brought, which Opinion interpreted the parts of the Order of the National Labor Relations Board on which the said motion relies; and that the motion is in effect to secure an enlargement and modification of the Order of the National Labor Relations Board and the final Decree of this Court and by implication and inference to expand the scope and operation of the Order and Decree beyond the fair meaning of what was intended to be prohibited in the light of the issues, so as to make the Board's Order as modified apply to and determine and prohibit matters not litigated, determined and prohibited by Such Order and Decree;

[fol. 77] (5) That inasmuch as the Amalgamated's motion was brought without legal right, the "response" thereto and "suggestion" by counsel for the National Labor Relations Board are unauthorized and cannot operate to support or cause to be prosecuted a motion which the Amalgamated Utility Workers has no lawful authority to institute or maintain under the National Labor Relations Act; and

(6) That the facts stated in the said motion and accompanying affidavits are insufficient to show or constitute a violation of the modifying Decree entered by this Court on January 21, 1939, granting enforcement of the Order of the National Labor Relations Board entered November 10, 1937, as modified and interpreted by the Opinion of the Supreme Court of the United States on December 6, 1938; and that the undersigned will, at the time and place above stated, move the Court for such other and further relief as may be just and appropriate in the premises.

New York, May 18, 1939.

(Sgd.) Claude A. Hope, Isaac Lobe Straus, of Counsel. Isaac Lobe Straus, Delafield, Marsh, Porter & Hope and Claude A. Hope, Solicitors for International Brotherhood of Electrical Workers, et al., 20 Exchange Place, New York, N. Y.

[fol. 78] To:

Whitman, Ransom, Coulson & Goetz, Solicitors for Consolidated Edison Company of New York, Inc., et al., No. 40 Wall Street, New York, N. Y.

Boudin, Cohn & Glickstein, Esqs., Solicitors for Amalgamated Utility Workers, No. 20 West 43rd Street, New York, N. Y.

Charles Fay, Esq., General Counsel National Labor Relations Board, Shoreham Building, Washington, D. C.

Allan Perl, Esq., Acting Regional Attorney, National Labor Relations Board, No. 120 Wall Street, New York, N. Y.

[fol. 79] Order Denying Motion to Dismiss

Motion denied on ground that the matters submitted in support thereof should properly be asserted in opposition to the Amalgamated Utility Workers motion to punish for contempt.

June 2, 1939.

T. W. S., A. N. H., R. P. P., Cjj.

[fol. 80] Clerk's certificate to foregoing pages omitted in printing.

[fol. 81] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 16, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 342

AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Petitioner,

against

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BOUDIN, COHN & GLICKSTEIN,
Attorneys for Amalgamated Utility Workers, Petitioner,
20 West 43rd Street,
New York City, N. Y.

LOUIS B. BOUDIN,
of Counsel.

The Hecla Press : : New York City 39

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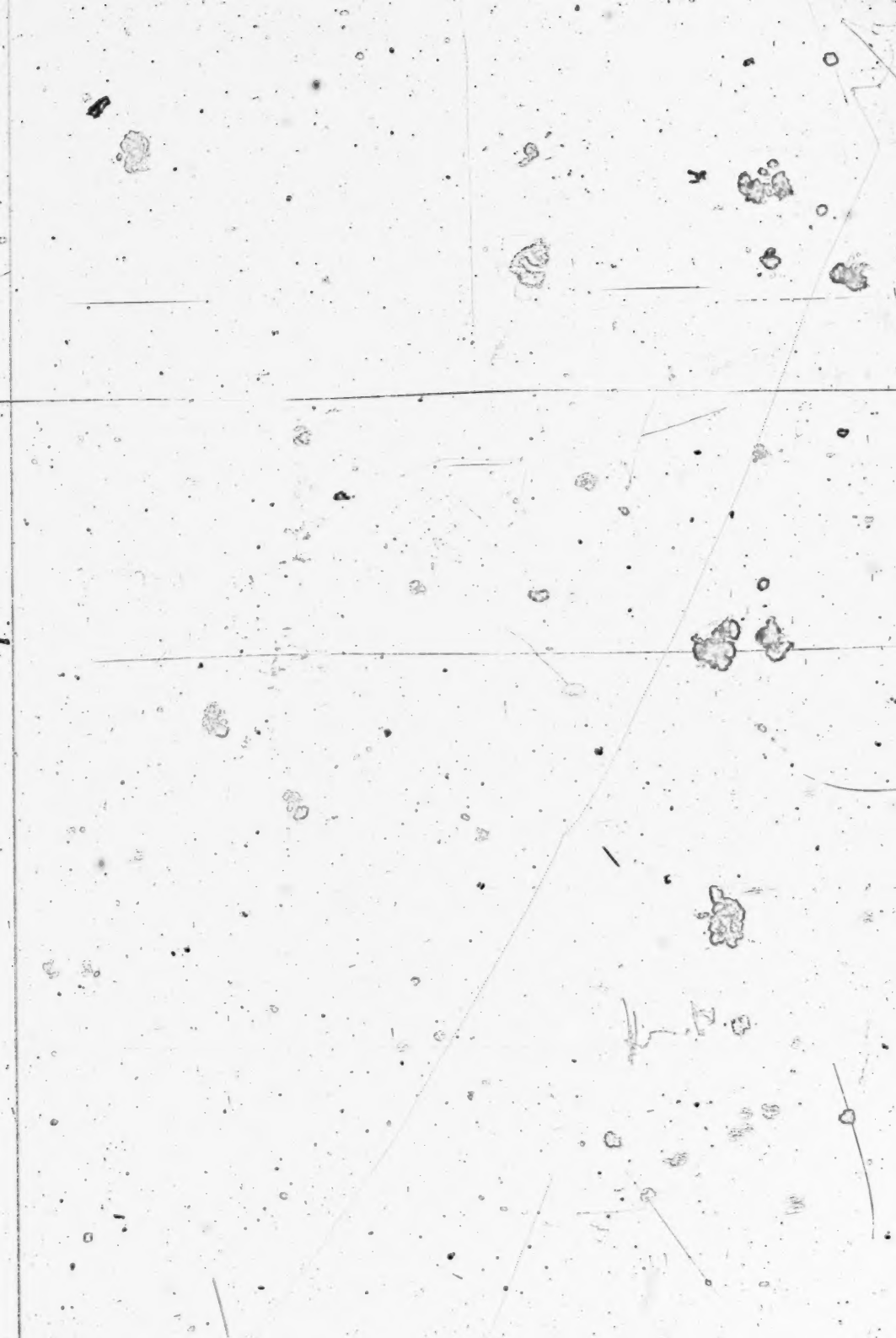

STATUTES.

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Judicial Code, Section 240(a), as amended by the Act of February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 938 [U. S. Code, Tit. 28, Sec. 347(a)] 10

National Labor Relations Act of July 5, 1935, Chap. 572, Sec. 10, 49 Stat. 453 [U. S. Code, Tit. 29, Sec. 160(e)] 10

Same—Sec. 1. 16
" —Sec. 3(c) 22
" —Sec. 7. 17
" —Sec. 8. ..... 18, 20
" —Sec. 10(a) 22
" —Sec. 10(f) 23

Federal Trade Commission Act, Section 5 (Sec. 45 of Title 15, U. S. Code) 20, 21

IN THE

Supreme Court of the United States

In the Matter of the Application of AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS, To Punish CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its Affiliated Companies, BROOKLYN EDISON COMPANY, INC., NEW YORK AND QUEENS ELECTRIC LIGHT AND POWER COMPANY, WESTCHESTER LIGHTING COMPANY, THE YONKERS ELECTRIC LIGHT AND POWER COMPANY, NEW YORK STEAM CORPORATION, and CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY COMPANY, For Contempt.	OCTOBER TERM, 1939
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its Affiliated Companies, et al., Petitioners, against NATIONAL LABOR RELATIONS BOARD, et al., Respondents.	No.....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Amalgamated Utility Workers, respectfully prays that a *writ of certiorari* issue to review the

decision of the United States Circuit Court of Appeals for the Second Circuit rendered in the above proceeding on June 2, 1939, denying Petitioner's motion for an order adjudging Consolidated Edison Company of New York, Inc., and its Affiliated Companies, in contempt of court.

A.

Statement of the Matter Involved.

Petitioner herein, Amalgamated Utility Workers, (formerly known as United Electrical and Radio Workers of America), is a labor union affiliated with Utility Workers Organizing Committee, Congress of Industrial Organizations (CIO). Prior to May 10, 1937, Petitioner, under its former name, United Electrical and Radio Workers of America, filed with the National Labor Relations Board a certain charge or complaint against Consolidated Edison Company of New York, Inc., and its Affiliated Companies named above, to the effect that the said companies had engaged in certain unfair labor practices affecting commerce within the meaning of the National Labor Relations Act, against their employees, being members of Petitioner; and also that the said companies violated the provisions of the National Labor Relations Act by discouraging membership in this Petitioner. Thereupon, and by reason of the filing of the said charges and complaint, the National Labor Relations Board, on or about May 10, 1937, issued its complaint against Consolidated Edison Company of New York, Inc., and its said Affiliated Companies; and thereafter, and in pursuance to the said complaint, hearings were held thereon, which said hearings resulted in an order made by the National Labor Relations Board, on November 10, 1937, which ordered and directed the Consolidated Edison Company of New York, Inc. and its said Affiliated Companies to cease and desist from certain practices and to take certain affirmative action.

The "cease and desist" portion of the said order directed Consolidated Edison Company of New York, Inc. and its said Affiliated Companies to—

"Cease and desist from:

a. *Discouraging membership in United Electrical and Radio Workers of America* or any other labor organization of their employees, or encouraging membership in International Brotherhood of Electrical Workers or any other labor organization of their employees, by discharging or refusing to reinstate any of their employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment because of membership or activity in connection with any such labor organization;

b. Urging, persuading, warning, or coercing their employees to join International Brotherhood of Electrical Workers, or any other labor organization of their employees, or threatening them with discharge if they fail to join any such labor organization;

c. Permitting organizers and collectors of dues for International Brotherhood of Electrical Workers or any other labor organization to engage in activities among their employees in behalf of such labor organizations during working hours or on the respondents' property, unless similar privileges are granted to United Electrical and Radio Workers of America and all other labor organizations of their employees;

d. Permitting their employees who were officials of the Employees' Representation Plans to use the respondents' time, property, and money in behalf of International Brotherhood of Electrical Workers or any other labor organization of their employees;

e. Employing detectives to investigate the activities of their employees in behalf of United Electrical and Radio Workers of America or any other labor organization of their employees or employing any other form or manner of espionage for such purposes;

f. Giving effect to their contracts with the International Brotherhood of Electrical Workers;

g. Recognizing the International Brotherhood of Electrical Workers as the exclusive representative of their employees;

h. In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection."

Thereupon Consolidated Edison Company of New York, Inc. and its said Affiliated Companies moved in the United States Circuit Court of Appeals for the Second Circuit to vacate and set aside the said order, and the National Labor Relations Board moved to confirm its order. While the said motions were pending, but before the same were heard, this Petitioner moved for an order permitting it to intervene in the proceedings so pending in the United States Circuit Court of Appeals, and the said motion was granted by the said Court, and this Petitioner thereupon became a formal party to the said proceeding. Thereafter the said motions came on for hearing, and were duly heard, and upon such hearing this Petitioner appeared by its counsel, Louis B. Boudin, Esq., who argued on behalf of this Petitioner orally in support of the order of the National Labor Relations Board, and also filed a brief in support of the same. The said motions terminated in an order of the United States Circuit Court of Appeals for the Second Circuit, confirming the said order of the National Labor Relations Board. The decision of the United States Circuit Court of Appeals is reported in 95 Fed. (2d) at p. 390.

Thereafter, Consolidated Edison Company of New York, Inc. and its said Affiliated Companies applied to the United States Supreme Court for a *writ of certiorari* to review the said decision of the Circuit Court of Appeals. Upon the said application notice was duly given to your Petitioner's counsel, Louis B. Boudin, Esq., who filed a brief in this Court in opposition to the said application. The said application was granted by this Court, and thereupon the said appeal

was argued in and heard by this Court. Upon the said argument your Petitioner appeared by its counsel, Louis B. Boudin, Esq., who argued the cause orally on behalf of this Petitioner, and also filed a brief in this Court for and on behalf of this Petitioner in support of the order of the Circuit Court of Appeals so appealed from. Thereupon this Court made its decision, modifying the decision of the Circuit Court of Appeals in one particular, and as so modified affirmed the same. The modification consisted in eliminating from the order of the National Labor Relations Board as quoted above the paragraph thereof marked "f", leaving all of the rest of the said order in full force and effect. The decision of this Court so made is reported in 305 U. S. at p. 197. Thereafter and thereupon the United States Circuit Court of Appeals for the Second Circuit, upon receiving the mandate of this Court, modified its decree in accordance with the directions of this Court. The last mentioned decree of the Circuit Court of Appeals was made and entered on or about the 21st day of March, 1939.

Thereafter, Consolidated Edison Company of New York, Inc. and its said Affiliated Companies committed certain acts and continued and still continue and are engaged in certain practices which your Petitioner believed, and still believes, were and are in violation of the decision of this Court and of the decree of the Circuit Court of Appeals entered in pursuance to the decision and mandate of this Court; and Petitioner, feeling aggrieved thereby, filed a petition in the United States Circuit Court of Appeals for the Second Circuit praying that Consolidated Edison Company of New York, Inc. and its said Affiliated Companies be adjudged in contempt of court for such violations. A summary of the facts upon which the said charge of violation was based is contained in the said petition; and the said allegations and charges were supported by voluminous affidavits which were filed in the said Court at the same time.

Notice of the said application was given to Consolidated Edison Company of New York, Inc. and its said Affiliated Companies, and the said companies thereupon filed an answer

to the said petition, and also certain affidavits in support of the allegations of their said answer, which said affidavits related to the commission or non-commission of the acts charged in Petitioner's affidavits.

The said answer commenced with the following statement, to wit:

> "Answering the motion and petition of Amalgamated Utility Workers affiliated with the Utility Workers Organizing Committee, C I O, dated May 10, 1939, *but reserving all objections to the assumed right of the Amalgamated Utility Workers to maintain this contempt proceeding* and to the assumption of jurisdiction by this Court over the proceeding instituted and prosecuted by the Amalgamated Utility Workers, the Consolidated Edison Company of New York, Inc., and its affiliated Companies, Brooklyn Edison Company, Inc., New York and Queens Electric Light and Power Company, Westchester Lighting Company, The Yonkers Electric Light and Power Company, New York Steam Corporation, and Consolidated Telegraph and Electrical Subway Company (hereinafter referred to as 'the companies'), by their attorneys, Whitman, Ransom, Coulson and Goetz, respectfully allege and show, upon information and belief, as follows:"

At the hearing upon the said motion or application, counsel for Consolidated Edison Company of New York, Inc. and its Affiliated Companies, in accordance with the reservation contained in the opening paragraph of their answer, made a preliminary objection to the effect that Petitioner had no right to make such a motion under the provisions of the National Labor Relations Act, and therefore had no standing in court—claiming that the only body or agency that could make such a motion under the provisions of the National Labor Relations Act was the National Labor Relations Board. The Circuit Court of Appeals thereupon sustained the said objection and *refused to entertain or consider the said motion or application upon the merits, upon the sole ground that Amalgamated Utility Workers had no standing in court.*

B.

Question Presented.

The *sole* question presented is:

Is the National Labor Relations Board the sole agency which may, under the provisions of the National Labor Relations Act, move to punish as for a contempt of court a person violating an order made by the National Labor Relations Board, after the same had been confirmed by the Circuit Court of Appeals, and has a person or body aggrieved by such violation no right to pray the Circuit Court of Appeals for relief to punish the violator for a contempt of court?

C.

Reasons Relied on for the Allowance of the Writ.

The question presented is one of statutory construction and of the greatest importance in the administration of the National Labor Relations Act, and has never been passed upon by this Court, nor by any Circuit Court of Appeals, except the Circuit Court of Appeals for the Second Circuit in the order sought to be reviewed. It is self-evident that the question is of the utmost importance not only to the Petitioner herein, but to all the labor-unions of this country, and to the entire body of workers of this country, since, as Petitioner believes, the decision sought to be reviewed seriously curtails their rights under the National Labor Relations Act.

In addition, the question is of the greatest importance to the National Labor Relations Board itself, and to the public at large, since this decision places upon the National Labor Relations Board the duty of examining into every claimed violation of the decrees of the Circuit Court of Appeals affirming its orders; and of prosecuting every such violation found to exist; and upon the public the expense of maintaining and paying for a sufficiently large legal staff to enable the National Labor Relations Board to discharge such duty.

Aside from the question of expense to the public involved, it is manifest that the National Labor Relations Board,—which is, as is well known, far behind its calendar because of the many cases brought to it for decision,—will be utterly unable to cope with the additional work that would devolve upon it if the decision sought to be reviewed be adhered to.

Petitioner also firmly believes that the decision sought to be reviewed is utterly at variance with the express provisions of the National Labor Relations Act; is contrary to the entire spirit of that enactment; and if permitted to stand will go far to destroy the remedies granted thereby, and to encourage the evil which the enactment of the National Labor Relations Act was intended to remedy.

Your Petitioner verily believes that this application presents a case cognizable under the rules of this Honorable Court and one eminently proper for review by this Honorable Court.

WHEREFORE, your Petitioner respectfully prays that a *writ of certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record upon which its said decision and order were made, and that said order of the Circuit Court of Appeals may be reversed or modified by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

And your Petitioner will ever pray, etc.

Dated, August 28, 1939.

LOUIS B. BOUDIN,
of Counsel for Petitioner.

IN THE

Supreme Court of the United States

In the Matter of the Application
of
AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS,
To Punish
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its Affiliated Companies, BROOKLYN EDISON COMPANY, INC., NEW YORK AND QUEENS ELECTRIC LIGHT AND POWER COMPANY, WESTCHESTER LIGHTING COMPANY, THE YONKERS ELECTRIC LIGHT AND POWER COMPANY, NEW YORK STEAM CORPORATION, and CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY COMPANY,
For Contempt.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its Affiliated Companies, et al.,
Petitioners,
against
NATIONAL LABOR RELATIONS BOARD, et al.,
Respondents.

OCTOBER TERM, 1939

No.....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions Below.

The Circuit Court of Appeals, in the decision sought to be reviewed, rendered no opinion, except the following memorandum:

> "Motion denied on ground that moving party has no standing to press a charge of civil contempt, if contempt has been committed. Under the National Labor Relations Act the Board is the proper party to apply to the court for an order of enforcement and to present to the court charges that the court's order has not been obeyed."

II.

Jurisdiction.

Petitioner seeks a review by *certiorari* pursuant to Judicial Code, Section 240(a), as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (U. S. C. Tit. 28, Sec. 347(a)), and Sec. 10(e) of the National Labor Relations Act of July 5, 1935, c. 372, Sec. 10, 49 Stat. 453 (U. S. C. Tit. 29, Sec. 160(e)). The date of the decision and order sought to be reviewed is June 2, 1939. It was entered by the United States Circuit Court of Appeals for the Second Circuit in pursuanee of its ruling refusing to consider upon the merits the petition presented to it by Petitioner, and the charges made therein to the effect that respondent companies have violated the order of the National Labor Relations Board, as affirmed by the Circuit Court of Appeals and this Court. The matter came before the United States Circuit Court of Appeals for the Second Circuit by written petition of the Petitioner herein and the answer of Consolidated Edison Company of New York, Inc. and its Affiliated Companies.

III.

Statement of the Case.

A full statement of the case has been given under heading A in the petition for *writ of certiorari,* and for brevity the statement is not repeated here.

IV.

Specifications of Error.

The Circuit Court of Appeals erred in holding that Petitioner, the labor-union which filed the original charges or complaint upon which the National Labor Relations Board acted, and which was officially made a party to the original proceeding by order of the Circuit Court of Appeals, and was a party in the original proceeding in the said court as well as in this Court, and which is specifically mentioned in and directly affected by the order of the National Labor Relations Board, affirmed by the Circuit Court of Appeals and by this Court, had no standing in court to move to adjudge and punish the violators of the said order, as for a contempt of court, where the violation directly affects its rights and the rights of its members under the said order.

V.

Argument.

As stated in the preceding petition, the present Petitioner initiated the proceeding which resulted in the order of the National Labor Relations Board affirmed by the Circuit Court of Appeals and this Court. Formally, the said proceeding was commenced by the National Labor Relations Board filing its own complaint. But that complaint was the result of a charge or complaint filed by the present Petitioner with the Board. This Petitioner was, therefore, the real complainant in the case, even though formally the complaint was that of the National Labor Relations Board.

After the National Labor Relations Board made its order, the present Petitioner became a formal party to the proceeding by an order of the Circuit Court of Appeals permitting it to intervene, and it continued such a formal party in this Court,—its own counsel, appearing formally for it and on its behalf, arguing orally and submitting briefs in both the Circuit Court of Appeals and in this Court.

But not only did the present Petitioner initiate the proceeding, and participate as a formal party throughout the entire court litigation which resulted in the decree of the court claimed to have been violated, but that decree expressly recognizes the special rights of Petitioner in its very first provision. As stated in the preceding petition, the order of the National Labor Relations Board, affirmed by the Circuit Court of Appeals and by this Court, consists of two parts,—one containing prohibitions and the other containing directions. The first portion which contains the prohibitions orders Consolidated Edison Company of New York, Inc. and its Affiliated Companies to,—

> *"Cease and desist from: discouraging membership in United Electrical and Radio Workers of America,"*—

that being the name under which the present Petitioner was known at the time of the filing of the original charges and throughout the proceeding which resulted in the order in question.

Petitioner was thus not only a party litigant, but a party which recovered a judgment or decree protecting its own rights, in addition to its being the protector of the rights of its members. The petition to punish for contempt shows that its own rights as an organization as well as those of its members have been invaded by the violations complained of, and the petition was filed for the protection of its own rights as well as those of its members.

Petitioner's right to press for the punishment of the violators of the order and decree involved herein would seem to be unquestioned on general principles of law, but for the narrow, and, as we believe, utterly unwarranted construction given to the National Labor Relations Act by the court be-

low. This brings us to a consideration of the view of the law taken by the court below, which resulted in the order sought to be reviewed. Unfortunately, the court below did not write any opinion, and the reasoning which led to its conclusions has not been authoritatively stated. We must, therefore, resort to the arguments made by counsel on the other side in their argument on the objection which the court sustained for a statement of that reasoning. That argument was, in substance, that the National Labor Relations Act does not create any *private rights*, and that, therefore, the National Labor Relations Board,—the *public body* created by that Act,—is the only body which can invoke the aid of the courts against its violators. Enlarging upon that position, counsel for the other side argued that the National Labor Relations Act is similar to the Federal Trade Commission Act, and that the practice thereunder must, therefore, be assimilated to the practice under the Federal Trade Commission Act. And that since it had been held that a private party cannot move for the punishment of the violation of an order of the Federal Trade Commission, the same rule applies to violations of the orders of the National Labor Relations Board. This contention we believe to be utterly untenable, as flying in the face of the express provisions of the National Labor Relations Act. It seems to us clear that if the practice under the National Labor Relations Act is to be assimilated to the existing practice under any earlier Act, it should be assimilated to the practice under the Interstate Commerce Act, rather than to that under the Federal Trade Commission Act. Or, rather,—since this is not a question of *practice* but of *substantive law*,—if the character of the Act is to be judged by analogy to some other Act of Congress, it will be found that it is of the same character as the Interstate Commerce Act and not at all like the Federal Trade Commission Act.

The character of an Act of Congress is determined by the evil which it was designed to remedy, and, of course, its express provisions. And in interpreting a particular provision, in a doubtful case, the entire character of the Act, as gleaned from *all* of its provisions, as well as the nature

of the evil which it was intended to remedy, must be taken into consideration. And, we respectfully submit, that an examination of the Labor Relations Act under both aspects leads to the conclusion that the Act was designed *to confer rights upon individuals and associations, which they must be in a position themselves to assert;* and that the protection of those rights was not meant to be left entirely to the National Labor Relations Board. When the National Labor Relations Board has acted, and a violation of the rights thereby secured, and the remedy therefor prescribed, those whose rights have been found to have been violated and for whose benefit the remedies have been prescribed, have rights which they may assert in court *in propria persona,* and without the intervention of the National Labor Relations Board.

That the National Labor Relations Act is utterly *unlike* the Federal Trade Commission Act is self-evident: The latter Act deals entirely with frauds upon the public at large; while our Act deals with industrial practices designed to injuriously affect, and which do affect injuriously, special groups and individuals. An unfair labor practice does not consist in doing something to employees generally, but in acts affecting injuriously particular employees because they have attempted to organize themselves into labor organizations. Or, in another class of cases, the unfair labor practice consists in injury to particular labor organizations by discouraging membership in these organizations. It is true, that such acts are declared to be injurious to the public at large because of the manner in which they affect commerce. But that is also true of the unfair practices dealt with in the Interstate Commerce Act, and it is this which makes the National Labor Relations Act *like* the Interstate Commerce Act. Both of these Acts were designed to prevent certain industrial practices, which Congress had found to exist, which put it in the power of those controlling the industrial processes in question, to favor certain groups or individuals as against others, *to the injury of the latter,* but also to the injury of the public because of their effect upon commerce. That it is the injury to these individuals and groups with

which the legislation is primarily concerned is evident upon a bare inspection of the Act here under consideration. In fact, upon careful consideration, it will be found that the National Labor Relations Act emphasizes more strongly the *private* aspect of the evil with which it deals than does the Interstate Commerce Act. And this must be borne in mind when construing the remedial provisions of our Act.

In this connection it must be remembered that the right of Congress to legislate at all on this subject is due, not, as in the case of the Interstate Commerce Act, to a constitutional grant of power to legislate directly on the subject; but rather because of the effects upon commerce of the actions of the groups and individuals who are injuriously affected by the industrial practices sought to be prevented. Concededly, Congress has no power to legislate on the relation of master and servant, purely and exclusively as such, when the same relates to production only. If the matter were to be considered from that angle exclusively, Congress had no right to legislate on the labor relations of any of the employers involved in the cases decided by this Court under the National Labor Relations Act commencing with the *Jones and Laughlin* Case. The right of Congress to legislate on the subject is due entirely to the fact that the private grievances of certain individuals and groups in a matter in itself not subject to federal regulation has been found to habitually lead to certain *actions* on the part of those individuals and groups,—namely, *strikes*,—which made their *private grievances* a matter of public and federal concern within the meaning of the Constitution. In this respect the National Labor Relations Act differs from the Interstate Commerce Act, which deals with a subject matter directly within the power of the Federal Government. The *private* aspect of the problem is, therefore, much more pronounced in the National Labor Relations Act than in the Interstate Commerce Act. In construing our Act, that aspect of the situation must be particularly borne in mind,—and wherever there is any doubt at all, the Act must be construed with a view to the private grievances which Congress has found must result in certain acts on the part of those aggrieved,

providing *ample opportunity for the protection of the rights secured by the Act upon the motion of the parties aggrieved,* if the Act is to achieve the purpose and have the beneficial effects which Congress had in mind.

And this is not an invitation to the Court to speculate upon the purposes or intentions of Congress. Those purposes and intentions are clearly and expressly stated in the Act itself. The very first words of the Act show that the Act deals with private rights, and the entire statement of policy contained in Section 1 of the Act is an elaboration of the purpose of the Act to protect those private rights, because of the injurious effect which a denial of those rights has upon commerce, due to the action of the individuals and groups involved which would of necessity follow upon a denial of their rights. The opening statement of the policy of the Act is as follows:

> "The denial by employers of *the right of employees* to organize and the refusal by employers to accept the procedure of collective bargaining *lead to strikes and other forms of industrial strife or unrest,* which have the intent or the necessary effect of burdening or obstructing commerce."

And after elaborating on the thesis thus stated, the Act proceeds to say—

> "Experience has proved that protection by law of *the right of employees* to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce."

And after elaborating the second thesis, the Act concludes the statement of policy as follows:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by *protecting the exercise by workers of full freedom of association, self-*

> *organization, and designation of representatives of their own choosing,* for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

We turn from the statement of purpose and policy of the Act to its specific provisions. An examination of those provisions, we respectfully submit, clearly indicates an intention to confer *private rights* upon individuals as well as groups or associations which have an existence independent of any specific procedure provided by the Act, or agency created thereby. We do not mean to say by this that we suggest that the procedure followed by Petitioner is not actually provided by the Act. On the contrary, we contend that this procedure is actually provided by the Act,—even though we admit that it is not stated so clearly that no argument to the contrary could possibly be made. Although we must confess our amazement at the result arrived at by the court below after considering every argument that could possibly be advanced on the other side,—due regard being had to *all* of the provisions of the Act. That the Act confers a general right *upon individuals,* and that that right is *independent* of any other provision of the Act, is clear from Section 7 of the Act, the provisions of which are independent of any other provisions of the Act. Section 7 is as follows:

> *"Employees shall have the right* to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

In the face of these specific provisions of the statute,—stated as they are in a separate section of the Act,—we believe it is not even arguable that private rights are not created by the Act. The possibility of an argument on the other side,—the existence of which we conceded above,—refers only to the possibility of an argument as to whether the Petitioner has standing in court to assert these private

rights in the particular manner, but not as to their existence. The argument may be of two kinds: first, that the rights conferred are those of individuals only; and, second, that these rights can only be exercised in some special mode provided by the Act itself. But upon examination it will be found that this argument is utterly untenable on both of its branches. And for the following reasons:

(a) The Act clearly recognizes the rights of groups, particularly the rights of labor organizations.

An examination of the Act will show that throughout it speaks not only of the rights of individuals, but also of the rights of groups, and *specifically confers certain rights upon labor organizations.* So, for instance, in Subsection (a) of Section 9 of the Act it is provided that, notwithstanding the legality of a so-called closed-shop agreement if entered into under the conditions in that subsection stated, and an agreement having been entered into between an employer and a certain labor organization for a closed shop thereunder, "any individual employee or a *group of employees shall have the right* at any time to present grievances to their employer." But aside from the general recognition of the rights of groups *as* groups, there is specific recognition of labor-unions, and certain rights conferred upon them, under the designation "labor organizations." So, for instance, by Section 8 of the Act it is made an unfair labor practice—

> "To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

Or,—

> "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage *or discourage membership in any labor organization.*"

Clearly, both the wrongs sought to be remedied as well as the rights conferred by this Act are primarily *private,*

even though the public has enough of an interest therein, because of the consequences to commerce flowing from a violation of the same to justify Congress in legislating on the subject and setting up an administrative agency for their protection. This brings us to the second contention, namely, that the general rights granted by the statute are limited by the setting up of the public agency which is to administer the Act.

(b) The powers conferred upon the National Labor Relations Board are not in derogation of the rights conferred by the National Labor Relations Act upon individuals, groups and organizations. Nor are its powers exclusive, except to determine, in the first instance, whether an unfair labor practice had been committed, and to prescribe the remedy therefor.

Before examining the specific provisions bearing upon this point, if any there be in the Act, we must again consider the purpose and object of the Act and its character as a whole. As already stated, the contention is that this Act is like the Federal Trade Commission Act, and that the practice thereunder should be assimilated to the practice under that Act, as prescribed by the decisions of the courts. But a mere glance at the two acts will demonstrate that the two acts are utterly unlike not only in their respective purposes, objects and characters as a whole, but in the character of their specific provisions. The evil designed to be remedied by the Federal Trade Commission Act being wholly and exclusively a public evil,—in the sense of frauds or impositions upon the public at large,—the whole Act of necessity partakes of the character of penal legislation. Its chief characteristic, therefore, is *that it does not create any private rights but declares public wrongs.* We have already seen that the principal section of the National Labor Relations Act,—the section which lays down the basic principle around which the whole Act revolves,—is a declaration of rights, *private rights.* Needless to say, the Federal Trade Commission Act declares no rights. The basic provision of the Federal Trade Commission Act is contained in the heading to and the opening sentence of Section 5 of

that Act (now Section 45 of Title 15, U. S. Code), which are as follows:

> "UNFAIR METHODS OF COMPETITION UNLAWFUL; PREVENTION BY COMMISSION: *Unfair methods of competition in commerce are declared unlawful.*"

"Unlawful" is the keynote of the Federal Trade Commission Act, and all its provisions are in harmony. It being a statute defining *wrongs*, a public agency is set up to protect the *public* against those wrongs and to prosecute the wrongdoers. Of necessity, that agency is the only body that can move under the statute,—just as public prosecutors are the only ones that can move in the prosecution of criminal offenses.

In this connection it is significant that even the acts prohibited by the National Labor Relations Act are not declared to be "unlawful". It is true that certain acts or practices are by the Act declared to be violations of its provisions, but nowhere does it say that those acts or practices are "unlawful", in the sense of being public *wrongs*. Section 8 of the National Labor Relations Act, which is the only one containing prohibitions, and which immediately follows the one in which private rights have been expressly declared, merely says,—

> "It shall be an unfair labor practice for an employer"—

to do certain things. But an unfair labor practice is not "unlawful" in the sense in which that word is used in statutes defining public wrongs. A violation of the provisions of Section 8 of the National Labor Relations Act does not expose the employer to any criminal prosecution, or to any penalty whatever. But it does give rise to the granting of certain relief to the injured parties. In this respect the Act is exactly like the Interstate Commerce Act: which, like the Act here under consideration, is designed to prevent unfair industrial practices injurious to particular individuals in the prevention of which the public has an interest.

It was only natural, therefore, that the functions of the public agency set up by the National Labor Relations Act for its administration, should be like those of the Interstate Commerce Commission, and *unlike* those of the Federal Trade Commission. And a comparison of the provisions of the National Labor Relations Act defining the functions of the National Labor Relations Board will show that these functions are, basically, utterly unlike the functions of the Federal Trade Commission. If we turn to Section 5 of the Federal Trade Commission Act we shall find that, having in its first sentence declared certain practices to be *unlawful*, it proceeds in its next sentence to impose upon the Federal Trade Commission *the duty* of preventing such practices. That sentence reads as follows:

> "The Commission is empowered *and directed* to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce." (Italics ours.)

But no such *duty* is imposed upon the National Labor Relations Board by the National Labor Relations Act. The National Labor Relations Board is not *directed* to do anything. It is not a public prosecutor in any sense of the word. It therefore has no *duties* of any kind to perform under the Act. It is an *industrial court of first instance*, pure and simple. It is therefore endowed with certain *powers*,—powers to investigate complaints, and powers of *decision* after *hearing* upon notice. Being an *industrial* court, it can move of its own accord, but there is no duty imposed upon it to move. And as a matter of *practice*, established by the Board since its organization and approved by the courts, it moves only upon the complaint of private parties. That such practice is fully in accord with the Act, will be shown by an examination of other provisions of the Act which clearly show that Congress had intended to set up a court of first instance, wherein *cases are heard and determined*, rather than a prosecuting agency charged with the duty to *act* of its own accord in order to accomplish the

design of the Act. The first and most important,—the *basic*,—provision in this connection is that which confers the power to act at all. That is contained in the opening sentence of Subsection (a) of Section 10 of the Act, which says,—

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

This language is exactly the same as that which confers power upon United States courts of first instance to hear and determine cases, and is clearly intended to confer jurisdiction to act as a court. It certainly does not impose any duties upon the Board, any more than the grant of *power* to a district court to hear certain cases imposes upon it the duty to move of its own motion or to do anything after it has rendered a decision. Two things must be further noticed in this connection: One is the sentence which immediately follows the one just quoted and which is the only one which gives the Board *exclusive* power. It is our contention, which we believe is borne out by the context in which this "exclusive" provision is contained as well as by the other provisions of the Act, that this exclusiveness refers to the *jurisdiction* of the Board to *hear and determine* whether or not an unfair labor practice had been committed, and prescribe the remedy,—both in the first instance, of course. The other thing to be noticed is that wherever any power is granted by the Act to the Board, other than the power to hear and determine cases of unfair labor practices, the Act uses the word "may" or the phrase "shall have power." There is only one duty imposed by the Act upon the Board, as far as we can discover,—that is to say, a duty *to do* something rather than to perform its functions *properly*,—and that is contained in Subsection (c) of Section 3 of the Act, which reads as follows:

> "The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail *the cases it has heard, the deci-*

> ***sions it has rendered,*** **the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed."**

The language of this section we believe to be not only significant but decisive on the point here under consideration. Not only is there no duty imposed upon the Board to do anything, it need not even report any action it has taken,—indeed, no action is apparently contemplated,—except its action *in performing its functions of a court.* And in the latter connection it is clearly contemplated that the Board would not be moving of its own accord but that it would be *hearing cases,* like any other court. In other words, the Act contemplates that the Board will be acting upon the complaint of private parties, who will come before the court thus created to assert and *vindicate* the rights guaranteed to them by the Act.

And this, we respectfully submit, applies not only to the initial stages but also after the Board shall have rendered its *decision,* as other provisions of the Act clearly indicate,—nay, *expressly provide.* There is no provision in the Act *expressly* providing for the filing of any complaint by the parties whose rights have been invaded,—the only provision for a "complaint" is the complaint of the Board itself; although filing of charges or complaints by individual parties before the Board is clearly contemplated. But the only place in which the right of a private party *to proceed* is expressly provided is in connection with proceedings *after* the Board shall have rendered its decision. Subsection (f) of Section 10 of the Act provides as follows:

> ***"Any person aggrieved*** **by a final order of the Board granting *or denying* in whole or *in part the relief sought* may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside."**

An analysis of this provision establishes two things beyond peradventure of a doubt: First, that the Board is not the only one that has a right to come to the Circuit Court of Appeals to complain of an unfair labor practice, *after* the matter shall have been heard by it in the first instance. The Act specifically says "*any* person aggrieved." And it specifically says that this does not mean any person aggrieved by the granting of relief, but includes *any person aggrieved by the denial of relief,* in whole or in part. In other words, a person filing a charge or complaint with the Board, which the Board has heard and passed upon, has a right in case of an adverse decision, denying the relief sought by him either in whole or in part, to file a petition in the Circuit Court for review, *and ask the Circuit Court to grant the relief which the Board had denied him.*

Second, that the Act contemplates throughout the presence of private parties seeking relief,—thereby establishing the fundamental rule that private parties have not only rights but *a standing in court* even where there is no specific provision therefor. There is no specific provision anywhere in the Act for a private person filing a charge or complaint before the Board, or giving *standing* to any such person before the Board, that is to say, *in the court of first instance under this Act.* Nevertheless, the provision just quoted speaks of *any person* who *sought relief* before the Board. That this provision gives the party who filed the charges standing to prosecute the charge before the Board has been recognized by the Board itself, which permits individuals or organizations filing charges to officially intervene and become parties of record. The position or *standing* of the party filing the charges, as *an independent party,* has also been recognized by the Circuit Court of Appeals as well as by this Court. For the Circuit Court of Appeals as well as this Court have recognized the right of the party making the charges to *intervene,* even though he was not aggrieved by the decision, but merely desires to *press the enforcement* of the decision. Indeed, in this very case, the present Petitioner was permitted to appear as an independent party

intervenor both in the Circuit Court of Appeals and in this Court to *press for the enforcement* of the very order of the Board the violation of which is involved in the proceeding which resulted in the order sought to be reviewed.

We, therefore, respectfully submit, that while neither this Court nor the Circuit Courts of Appeal have ever directly passed on the question sought to be reviewed on this petition, the decision sought to be reviewed is clearly *against the established practice of all the Circuit Courts of Appeal, including the Second Circuit, as well as of this Court.*

But the rights thus granted to the private party, specifically on the question of review and impliedly on the question of pressing the charge before the Board, cannot possibly terminate suddenly after a decision of the courts reviewing the action of the Board and affirming it. Not only is there no logical reason for it,—it would be contrary to the whole spirit of the Act. Furthermore, we respectfully submit, that it would be contrary to its express provisions on the subject of enforcement when taken as a whole. Again, we respectfully call the attention of the Court to the fact that there is no duty imposed by this Act upon the Board, except the judicial duty *to hear and determine* a proper case properly presented to it by a person seeking relief against a violation of the provisions of the Act. Particular attention is called to the fact that there is *no provision in the Act requiring the Board to move for the enforcement of its orders.* It is granted the power to do so, but that is all. It needn't do so if it does not want to. Of necessity, that means that the person who sought relief before the Board, and who had the right to seek a review of its decision denying him relief in whole or in part, has the right to move for the enforcement of the relief granted by the Board but which it does not seek to enforce.

The decision sought to be reviewed does not, therefore, merely narrow the rights granted to individual employees and labor organizations by the Act,—it mutilates the Act, and places upon it a construction contrary not only to its spirit but to every other express provision bearing on the subject contained in the Act.

We respectfully submit, a correct reading of the Act gives to both the Board and the person or organization aggrieved the right to apply to the court for an enforcement of the orders of the Board at any stage of the proceeding, "aggrieved" meaning now a violation of the order rather than a denial of relief.

That the party seeking relief has a right to do so seems to us beyond question. If there is any question at all, it can only arise as to the kind of relief which may be asked for by the Board and the party aggrieved, respectively.

While it seems to us unquestioned that the party who sought relief before the Board, and whose rights were intended to be protected by the order of the Board, has the right to move to punish the violator as for a civil contempt of court, there may be some question as to whether a private party could move to punish the violators as for a criminal contempt of court, which may frequently be necessary in order to insure observance of the order. There is a similar question as to whether or not the Board, not being a party aggrieved and having no rights of its own in the matter but merely performing a public function, can move to punish for a civil contempt. A correct reading of the Act, we respectfully submit, leads to the conclusion that the Board can move to punish for a criminal contempt; while the party aggrieved, the party whose rights have been invaded, can move for a civil contempt,—which is the rule governing all proceedings in equity, *and which does equity.*

This being a preliminary brief on an application for a *writ of certiorari*, and, therefore, under the rules of this Court intended merely to raise the legal questions rather than argue them at length, we refrain from arguing this question at length as well as from considering certain cases from which in the argument below counsel on the other side sought to deduce a rule by an *analogy* from the decisions of the courts under the Federal Trade Commission Act, and certain stray expressions *obiter* in the decisions of some of the lower courts under the National Labor Relations Act. Such discussion, we believe, under the rules of this Court,

has only a place in the more extended argument reserved for the time *if* and *when* the application for the *writ of certiorari* is granted.

We respectfully submit, that this case is clearly one in which it is proper for this Court to grant the writ which would permit such an extended argument, and authoritatively settle the important question of statutory construction involved.

Dated, New York, August 28, 1939.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1939.

No. 342.

AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Petitioner,

against

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE PETITIONER.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 342

AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Petitioner,

against

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

Statement.

This matter comes before this Court on a petition to review an order of the United States Circuit Court of Appeals for the Second Circuit, denying Petitioner's motion to punish Respondents for contempt, on the ground that Petitioner has no standing in court to ask for such relief. The only opinion written by the court below was a memorandum reading as follows:

> "Motion denied on ground that moving party has no standing to press a charge of civil contempt, if contempt has been committed. Under the National

Labor Relations Act the Board is the proper party to apply to the court for an order of enforcement and to present to the court charges that the court's order has not been obeyed."

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 938; (U. S. C. Tit. 28, Sec. 347(a)), and Sec. 10(e) of the National Labor Relations Act of July 5, 1935, c. 372, Sec. 10, 49 Stat. 453 (U. S. C. Tit. 29, Sec. 160(e)). The writ of certiorari was granted by this Court on October 16, 1939.

Statute Involved.

The statute involved is the National Labor Relations Act (hereinafter sometimes referred to as "the Act"). The particular provisions of the Act which come into consideration on this appeal are Sections 1, 7, 8, 9 and 10.

Question Presented.

The sole question presented is:

Is the National Labor Relations Board the sole agency which may, under the provisions of the National Labor Relations Act, move to punish as for a contempt of court a person violating an order made by the National Labor Relations Board, after the same had been confirmed by the Circuit Court of Appeals; and has a person or body aggrieved by such violation no right to pray the Circuit Court of Appeals for relief by punishing the violator for a contempt of court?

Nature and History of the Case.

The petitioner, Amalgamated Utility Workers, (formerly known as United Electrical and Radio Workers of America,) is a labor union affiliated with the Congress of Industrial Organizations (C.I.O.). Prior to May 10, 1937, Petitioner (under its former name) filed with the National Labor Relations Board certain charges against Consolidated Edison Company of New York and its affiliates, the respondents herein, to the effect that the said companies had engaged in certain unfair labor practices affecting commerce within the meaning of the National Labor Relations Act, against their employees, being members of Petitioner; and also that the said companies violated the provisions of the National Labor Relations Act by discouraging membership in the Petitioner. Thereupon, and by reason of the filing of the said charges, the National Labor Relations Board, on or about May 10, 1937, issued a complaint against the respondents; and thereafter and in pursuance to the said complaint, hearings were held thereon which resulted in an order made by the National Labor Relations Board on November 10, 1937, which ordered and directed the respondents to cease and desist from certain practices and to take certain affirmative action.

The "cease and desist" portion of the said order directed Consolidated Edison Company of New York, Inc. and its said Affiliated Companies to—

> *"Cease and desist from:*
>
> a. *Discouraging membership in United Electrical and Radio Workers of America* or any other labor organization of their employees, or encouraging membership in International Brotherhood of Electrical Workers or any other labor organization of their employees, by discharging or refusing to reinstate any of their employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment because of membership or activity in connection with any such labor organization;

b. Urging, persuading, warning, or coercing their employees to join International Brotherhood of Electrical Workers, or any other labor organization of their employees, or threatening them with discharge if they fail to join any such labor organization;

c. Permitting organizers and collectors of dues for International Brotherhood of Electrical Workers or any other labor organization to engage in activities among their employees in behalf of such labor organizations during working hours or on the respondents' property, unless similar privileges are granted to United Electrical and Radio Workers of America and all other labor organizations of their employees;

d. Permitting their employees who were officials of the Employees' Representation Plans to use the respondents' time, property, and money in behalf of International Brotherhood of Electrical Workers or any other labor organization of their employees;

e. Employing detectives to investigate the activities of their employees in behalf of United Electrical and Radio Workers of America or any other labor organization of their employees or employing any other form or manner of espionage for such purposes;

f. Giving effect to their contracts with the International Brotherhood of Electrical Workers;

g. Recognizing the International Brotherhood of Electrical Workers as the exclusive representative of their employees;

h. In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection."

Thereupon Respondents moved in the United States Circuit Court of Appeals for the Second Circuit to vacate and set aside the said order, and the National Labor Relations Board moved to confirm its order. While the said motions were pending, but before the same were heard, the Petitioner moved for an order permitting it to intervene in the proceed-

ings, and the motion was granted. Petitioner thereupon became a formal party to the said proceeding.[1]

About the time that the Respondents moved in the Circuit Court of Appeals to set aside the order of the National Labor Relations Board, International Brotherhood of Electrical Workers (hereinafter sometimes referred to as I.B.E.W.), a national labor union, and certain "local unions" chartered by it, claiming to be aggrieved parties, filed a separate petition to set aside the said order, substantially on the same grounds as those stated by Respondents in their moving papers.

I.B.E.W. had been named in the charges filed by Petitioner with the National Labor Relations Board, as working in concert with Respondents; and among the unfair labor practices charged against Respondents was a claim that Respondents not only discouraged membership in Petitioner, but that it compelled its employees to become members of I.B.E.W.

During the hearings before the National Labor Relations Board it appeared that for many years prior to the decision of this Court validating the National Labor Relations Act (*N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and cases decided therewith) on April 12, 1937, the Respondents maintained seven company unions for the seven companies constituting the so-called Consolidated Edison system; and that immediately upon the announcement of the said decision, and in pursuance to a prearranged plan between Respondents and I.B.E.W.,—and in order to counteract an

---

[1] As a matter of fact, the standing of Petitioner as a *party* in the proceeding was recognized from the very beginning, and so was the standing of its counsel, who participated in the proceedings before the Board. The official decision of the Board containing its order is entitled:

> "In the Matter of Consolidated Edison Company of New York, Inc., and Its Affiliated Companies, * * * *and* United Electrical and Radio Workers of America, affiliated with the Committee for Industrial Organization."

And the listing of counsel contains the following:

> "Mr. Louis B. Boudin and Mr. Sidney Elliott Cohn, of New York City, for the United" (4 N. L. R. B. 71).

organization campaign which had been carried on for some time prior thereto among Consolidated's employees,—Respondents started a drive of its employees *into* the I.B.E.W. And that this drive resulted in the transformation of the seven company unions into seven alleged "locals" of the I.B.E.W.; and the execution of so-called collective bargaining agreements between the Respondents and the said company unions, rechristened "local unions" of I.B.E.W., *during the pendency of the proceedings before the National Labor Relations Board.* It is these contracts that were intended to be reached by paragraph "f" of the Board's order quoted above.

The two proceedings,—the proceeding on the petition of the Respondents and the proceeding on the petition of I.B.E.W. and its affiliates, (both to set aside the order of the Board) were consolidated by an order of the Circuit Court of Appeals. (See, Record on Appeal, *Consolidated Edison Co., et al.* v. *N.L.R.B.*; pp. 1736-1737).

The matter came to be heard before the Circuit Court of Appeals on the two petitions as thus consolidated, and upon such hearing the Petitioner appeared by its counsel, Louis B. Boudin, Esq., who argued orally and filed a brief in support of the Board's order. The proceedings in the Circuit Court of Appeals resulted in an order of that Court confirming the order of the Board. The decision of the Court of Appeals is reported in 95 Fed. (2d) at page 390.

Thereafter, Respondents applied to this Court for a *writ of certiorari* to review the decision of the Circuit Court of Appeals, and I.B.E.W. and its affiliates similarly applied for such writ. On the applications for these writs Petitioner, through its counsel, filed a brief in opposition to the application. The applications were granted by this Court, and the appeals were thereupon argued in this Court. Upon the argument in this Court, Petitioner again appeared by its counsel, Louis B. Boudin, Esq., who argued the cause orally and also filed a brief on behalf of Petitioner.

This Court modified the decree of the Circuit Court of Appeals by eliminating therefrom paragraph "f" quoted above, and as so modified affirmed the decree of the Circuit

Court of Appeals. The decision of this Court is reported in 305 U. S., 197. Thereupon, this Court sent its mandate to the Circuit Court of Appeals in accordance with its decision, and the Circuit Court of Appeals, upon receiving the mandate of this Court, modified its decree in accordance with the opinion of this Court. The last mentioned decree of the Circuit Court of Appeals was made on or about March 21, 1939.

Thereafter, Petitioner, claiming that Respondents violated the decree of the Circuit Court of Appeals, entered upon the mandate of this Court, filed a petition in that Court praying that Respondents be punished as for a contempt of court. The petition was dated May 10, 1939, and is printed at pages 4-13 of the Record.

Because the decree of the court claimed to have been violated was captioned in both of the cases in the Circuit Court of Appeals, consolidated as above stated, the petition to punish for contempt was similarly captioned, and notice was given to all the parties to both cases (R. 3-4).

When the motion came to be heard, Respondents as well as I.B.E.W. and affiliates, appeared and moved to dismiss the proceeding upon certain grounds stated in notices of motion previously served by them, which grounds were substantially alike. *Both of those motions were denied by the Circuit Court of Appeals, and no application for review of that decision has been made to this Court and none granted by this Court.*[2]

---

[2] It was because of this as well as because of the fact that, as will be seen further below, the order sought to be reviewed was entered only in the Consolidated Case and did not follow the joint caption of the decree, that we did not print in the Record the notice of motion of the I.B.E.W. which is printed in "Suggestion of a Diminution of the Record and Petition for Order for Its Correction." The order sought to be reviewed having been entered in the case to which I.B.E.W. was not a party, we could not see how any paper filed by it would have any relevancy, particularly since it did not raise any separate issue. And if a separate issue had been raised by I.B.E.W.'s motion to dismiss, we assumed that a review of the decision upon such issue could only be had by a separate application to this Court for *certiorari* to review.

Petitioner's application to punish was based not only on the petition printed in the record, but also upon voluminous affidavits which accompanied the petition and substantiated the charges therein contained. Respondents herein interposed an answer to the petition and also filed voluminous affidavits in support of its allegations.

I.B.E.W. and affiliates neither answered nor filed any affidavits in opposition.

Petitioner's application was argued in the court below on the merits, but after the argument the court made the order now sought to be reviewed, which disposed of the motion on the sole ground that Petitioner has no standing in court, without passing upon the merits of the application.

By stipulation between counsel for Petitioner and counsel for Respondents, it was agreed that none of the affidavits on either side, (except the affidavit of Floyd R. Carlisle),[3] should be certified to this Court or printed in the record. It was also stipulated—

> "That the petitioner for certiorari intends to bring up for review, and to rely upon; only the question as to whether or not the movant Amalgamated Utility

[3] As stated in the text, both sides submitted voluminous affidavits bearing on the merits, but since the merits are not involved on this appeal, it would have been a useless expense and waste of time to have all of those affidavits certified and printed,—aside from the fact that it would have brought before this Court an unnecessarily bulky record. We therefore asked counsel for the Respondents to consent to the omission of the certification and printing of *all* affidavits,—limiting the record to the formal petition and answer, so as to bring before this Court the *issues* raised in the court below. But counsel for Respondents refused to sign such stipulation unless we made an exception of Mr. Carlisle's affidavit and printed it in the record. This, notwithstanding the former stipulation that nothing but the standing of Petitioner in court would be brought up for review. We submitted to this exaction, rather than print the voluminous affidavits and have recourse to the rather disagreeable remedy under Subdivision 8 of Rule 38 of the Rules of this Court.

Workers has standing to make and maintain its said motion, which was denied by the United States Circuit Court of Appeals for the Second Circuit" (R. 2).

It was also stipulated that upon the hearing of the application for certiorari as well as upon any hearing before this Court, if certiorari be granted, either side may submit to this Court or refer to any of the other papers filed by either party in the Circuit Court of Appeals (R. 3).[4]

The order of the Circuit Court of Appeals sought to be reviewed (entered by the Court without the knowledge of Petitioner) was entitled in the Consolidated Edison case only, and not in both original proceedings, consolidated as above stated, which was the form followed by Petitioner in its application.

POINT I.

Petitioner was entitled, on general principles of law, to move to punish Respondents for contempt in the event of a disobedience of the decree secured by it.

We respectfully submit, that, unless there is something specific in or about the Act here under consideration which deprives the Petitioner of such right, the Petitioner was entitled, on general principles of law, to move the Circuit Court of Appeals to punish the Respondents for contempt of court, in the event of a failure of the Respondents to comply with the terms of the decree secured by it.

---

[4] Since it was expressly stipulated that only Petitioner's standing in court should be brought up for review, the provisions of the stipulation with reference to either side referring to papers dealing with the merits has, of course, no sense. But, as stated under Footnote 3, we had no choice in the matter, and had to take what was given us, unless we were ready to take the alternative course of printing all the affidavits and resort for relief to the provisions of Subdivision 8 of Rule 38 of the Rules.

We need not discuss here the academic question whether or not such a right is general,—in the sense that Petitioner would have a right to apply to the court to enforce that decree in matters not affecting it directly. There is room for the argument that a person securing a decree in equity which also affects other persons or groups, may not ask the court granting the decree to punish, as for a contempt of court, a violation of such portions of the decree as affect only such other persons or groups. But the argument against such right, we take it, would be based on the fact that the person asking the court for relief is not an aggrieved or injured party; and that relief would be denied in such a case on the general principle that only an aggrieved or injured party has standing in court, no matter how important the question involved.

Massachusetts v. *Mellon*, 262 U. S. 447.

But where a party who has secured a decree of court is actually injured or aggrieved by a failure to comply with, or a violation of, its provisions, it would seem beyond question that such party has standing in court to move for the enforcement of the decree by way of punishment for contempt of court. And it would be odd, and a *unicum* in our law, if a person having secured a decree of court for the protection of his rights were denied the right to seek its enforcement. It would be odd, to say the least, if Martin A. Wersing and the others whose reinstatement with back pay was ordered by the decree herein (R. 7) could not ask the court for the enforcement of the portion of the decree affecting them, in case of violation; and that their reinstatement or back pay would depend on the discretion of the National Labor Relations Board as to whether or not it cared to have the Respondents punished for such violation. We respectfully submit that it would be contrary to all our preconceptions of legal right, derived from the general principles of our legal system, that the rights thus settled by a decree of court should depend for their ultimate enforcement on the discretionary power of an administrative agency *which no longer has jurisdiction of the subject.*

And that, even though Martin A. Wersing and the other employees individually named in the decree were not parties to it in the same sense as was Petitioner. The general principles of equity jurisprudence, which transcend the old forms of the common law, would find a way of enforcing this portion of the decree, despite the indifference of either the National Labor Relations Board or the Petitioner, upon the application of the individuals directly concerned,—and we have no doubt that the way would be the punishment for contempt, upon the Court being apprised of the violation.

A fortiori, can there be no doubt of the right of Petitioner, a formal party to the proceeding, from its inception to its culmination in the decree violated by the Respondents, to come to the court which has made the decree settling its rights, petitioning for the punishment of a violation of those rights.

We need not go here into the abstract question whether Congress could, by specific provision in the Act creating the right upon which the decree herein is based, ordain that the enforcement of that right should depend, either in the first instance or at all times, upon the discretion of the National Labor Relations Board. The fact is that there is no such specific provision in the Act. And the point we are making here is, that in the absence of such specific provision it is contrary to well-established principles of our law to so interpret the Act. Not that we believe that the Act is, in fact, silent on the subject: As the discussion further below will show, it is our contention that the Act provides, at least by necessary implication, for the mode of procedure adopted by Petitioner. But it is our claim here that even if there were nothing in the Act to indicate that Petitioner has standing in court to enforce its rights as embodied in the decree rendered by the Circuit Court of Appeals and affirmed by this Court, such standing would be vouchsafed to it by the general principles underlying our legal system.

"No Right Without a Remedy," is the fundamental principle of equity jurisprudence. And we respectfully submit, that a remedy which lies *wholly in the discretion* of an administrative agency is not a remedy.

POINT II.

The National Labor Relations Act creates rights, and is therefore utterly unlike the Federal Trade Commission Act.

It is much to be regretted that the Court below did not see fit to write an opinion stating the legal theory upon which its decision was based. In the absence of such opinion we must assume that the argument of counsel on the other side made below and again in this Court in opposition to the application for the *writ of certiorari,* was adopted by the Court below. That argument is, that the National Labor Relations Act is similar to the Federal Trade Commission Act, and that the procedure under the former Act must, therefore, be assimilated to the procedure under the latter Act. It is then argued further that under decisions of this Court a person aggrieved by a practice as to which the Federal Trade Commission obtained a cease and desist order, has no independent standing in court to complain of the continuance of that practice. We shall see further below that the law involved in practices prohibited by the Federal Trade Commission Act, in so far as they affect private rights, is utterly misapprehended by those who make this contention. But at this point we respectfully submit that even if the law applicable to the subject matter covered by the Federal Trade Commission Act were as assumed by counsel on the other side, that would have no relevancy whatever to our case, since our Act is utterly different from the Federal Trade Commission Act.

A. The National Labor Relations Act and the Federal Trade Commission Act Contrasted.

We respectfully submit that a comparison of the National Labor Relations Act with the Federal Trade Commission Act will prove conclusively that the two acts are as unlike as any two acts of Congress could possibly be.

The character of an Act of Congress is determined by the evil which it was designed to remedy, and, of course, its express provisions. And in interpreting a particular provision, in a doubtful case, the character of the Act, as gleaned from *all* of its provisions, as well as the nature of the evil which it was intended to remedy, must be taken into consideration. And, we respectfully submit, that an examination of the Labor Relations Act under both aspects leads to the conclusion that the Act was designed *to confer rights upon individuals and associations;* and that the protection of those rights was not meant to be left entirely to the National Labor Relations Board. When the National Labor Relations Board has acted,—a violation of the rights thereby secured established, and the remedy therefor prescribed,—those whose rights have been found to have been invaded and for whose benefit the remedies have been prescribed, have rights which they may assert in court *in propria persona,* and without the intervention of the National Labor Relations Board.

This Act is, therefore, utterly unlike the Federal Trade Commission Act, which deals entirely with frauds upon the public at large,—and is therefore different both with respect to the nature of the evil sought to be remedied and with respect to the method applied to its eradication. The Federal Trade Commission Act, dealing as it does with frauds upon the public at large, is essentially penal in its character. What is important to remember in this connection is that notwithstanding the fact that the Federal Trade Commission Act seeks to prevent unfair methods of competition, it is not intended for the protection of the individuals or groups who are affected by those practices as *competitors,* but the rights of the public at large as *consumers.* On the other hand, our statute, while *motivated* by the injury resulting to the public at large from the prevalence of unfair labor practices, deals with and is designed to prevent practices which primarily affect special groups and individuals. An unfair labor practice does not consist in doing something to employees generally, but in acts affecting *particular employees* because they have attempted to organize themselves into *a*

particular organization. Or, in another class of cases, the unfair labor practice consists in injury to such a *particular organization* by discouraging membership therein. Its character is, therefore, exactly like that of the Interstate Commerce Act, which was designed to prevent certain industrial practices which Congress had found to exist, and which, in its opinion, put it in the power of those controlling industrial processes to favor certain groups or individuals as against others,—to the direct injury of the latter, and the resulting injury to the public.

That it is the injury to these individuals and groups with which our legislation is primarily concerned, is evident upon bare inspection of the Act. In fact, upon careful consideration, it will be found that the National Labor Relations Act emphasizes more strongly the private aspect of the evil with which it deals than does the Interstate Commerce Act. And this must be borne in mind when construing the remedial provisions of our Act.

In this connection it must be remembered that the right of Congress to legislate at all on our subject is due, not, as in the case of the Interstate Commerce Act, to a constitutional grant of power to legislate directly on the subject; but rather because of the effects upon commerce of the actions of the groups and individuals who are injuriously affected by the industrial practices sought to be prevented. Concededly, Congress has no power to legislate on the relation of master and servant, purely and exclusively as such, when the same relates to production only. If the matter were to be considered from that angle exclusively, Congress had no right to legislate on the labor relations of any of the employers involved in the cases decided by this Court under the National Labor Relations Act commencing with the *Jones and Laughlin* Case. The right of Congress to legislate on the subject is due entirely to the fact that the *private grievances* of certain individuals and groups in a matter in itself not subject to federal regulation has been found to habitually lead to certain *action on the part of those individuals and groups*,—namely, *strikes*,—which made their *private griev-*

ances a matter of public and federal concern within the meaning of the Constitution. In this respect the National Labor Relations Act differs from the Interstate Commerce Act, which deals with a subject matter directly within the power of the Federal Government. The *private aspect* of the problem is, therefore, much more pronounced in the National Labor Relations Act than in the Interstate Commerce Act. In construing our Act, that aspect of the situation must be borne in mind,—and whenever there is any doubt at all, the Act must be construed with a view to the private grievances which Congress has found must result in certain acts on the part of those aggrieved, and provide *ample opportunity for the protection of the rights secured by the Act upon the motion of the parties aggrieved*, to the end that the Act may achieve the purposes and have the beneficial effects which Congress had in mind.

Nor is this an invitation to the Court to speculate upon the purposes or intentions of Congress. Those purposes and intentions are clearly and expressly stated in the Act itself. The very first words of the Act show that the Act deals with private rights, and the entire statement of policy contained in Section 1 of the Act is an elaboration of the purpose of the Act to protect those private rights, because of the injurious effects which a denial of those rights has been found to have upon commerce. The opening statement of the policy of the Act is as follows:

> "The denial by employers of *the right of employees* to organize and the refusal by employers to accept the procedure of collective bargaining *lead to strikes and other forms of industrial strife or unrest*, which have the intent or the necessary effect of burdening or obstructing commerce."

And after elaborating on the thesis thus stated, the Act proceeds to say—

> "Experience has proved that protection by law of *the right of employees* to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce."

And after elaborating the second thesis, the Act concludes the statement of policy as follows:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by *protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing,* for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

All of which is in marked contrast to the nature and design of the Federal Trade Commission Act.

To begin with, the Federal Trade Commission Act, both in its history and design, is part of, or at least related to, our anti-trust legislation, which is designed to protect the public at large. The anti-trust laws are primarily penal statutes, notwithstanding the fact that they also provide for civil remedies. It is because of this general character of the Federal Trade Commission Act that it was made part of Title 15 of the United States Code, and placed immediately following the anti-trust acts.[5]

Turning from the place of the Federal Trade Commission Act in our law to its content, we find that it is also primarily a penal statute, designed to protect the public against evil practices calculated to injure the public at large. And the Federal Trade Commission is, primarily, a public agency to protect the public against these evil practices. *Both, the statute and the Commission created thereby, deal with Public Wrongs.* This is well summarized in the heading to Section 5 of the Act (U. S. Code, Title 15, Sec. 45) which is—

> *"Unfair methods of competition unlawful;* prevention by Commission."

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[5] The National Labor Relations Act, on the other hand, is Chapter VII of Title 29, which deals with labor and its rights.

And this is emphasized by the two opening sentences of that section which are as follows:

> *"Unfair methods of competition in commerce are declared unlawful.*
>
> "The Commission is empowered *and directed* to prevent persons, partnerships, or corporations, except banks and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."

The Federal Trade Commission is, in fact, a prosecuting agency, set up by the Federal Government to prevent injuries to the public by the prosecution of those who engage in the practices declared unlawful by the Act creating it. *"Unlawful"* is the keynote of the Federal Trade Commission Act, and prosecution of wrongdoers is the business of the Federal Trade Commission.

Needless to say, this is poles apart from the nature and design of the National Labor Relations Act and the functions of the National Labor Relations Board. Nothing is declared "unlawful" by the National Labor Relations Act; nor any *penalties* imposed by it. Unlike unfair trade practices, which are declared "unlawful" by the Federal Trade Commission Act, unfair labor practices are not "unlawful",—*they are merly infringements of the private rights created by the Act.*

B. The National Labor Relations Act Creates Private Rights.

Turning now from a consideration of the general objects and purposes of the National Labor Relations Act,—which we have found to be in striking contrast to those of the Federal Trade Commission Act,—to the consideration of the specific provisions of our Act, we shall find them to deal exclusively with private rights therein defined, and that the administrative agency thereby created is really a court of first instance wherein those rights may be asserted and litigated. We shall have to return to this subject again, and shall, therefore, not pursue this point any further here. For the true nature of the National Labor Relations Board can

only be understood after a careful consideration of the rights with which it is called upon to deal. That those rights are of a private nature seems to us a hardly disputable point, in view of the express provisions of the statute. Section 7 of the National Labor Relations Act (U. S. Code, Title 29, Section 157) reads as follows:

> "*Employees shall have the right* to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

We respectfully submit that in the face of this specific provision of the statute,—*contained in a separate section*, distinct and apart from that in which unfair labor practices are defined,—the nature of the rights created by this Act is hardly arguable. If there may be any argument at all, it is as to the manner in which these rights may be enforced, but not as to their existence. Being placed at a disadvantage of having to spread our argument "all over the lot" by the failure of the Court below to write an opinion, we must anticipate every possible avenue of argument that may be pursued by counsel on the other side. It is with that in view that the following is respectfully submitted:

(a) THE ACT CLEARLY RECOGNIZES THE RIGHTS OF GROUPS, PARTICULARLY THE RIGHTS OF LABOR ORGANIZATIONS.

One possible argument against the standing of the Petitioner in the proceeding initiated by it in the Court below, is, that while private rights are created by the statute, those rights are given to individuals and not to labor organizations. The answer to that is, that while the rights are those of individuals, *their enforcement and exercise* is clearly placed in the hands of labor organizations. Indeed, the purpose of the Act being the encouragement of *collective action*, the statute confers rights even on groups that have no formal organization. We need not inquire here into the question whether or not unorganized groups may have

standing in court, and if so, in what form. Suffice it to say, that the statute recognizes the existence of such groups and confers upon them rights which the employer may not violate. Subsection (a) of Section 9 of the Act provides that, notwithstanding the legality of a so-called closed-shop agreement if entered into under the conditions stated in that subsection, and an agreement entered into for a closed shop in accordance with its provisions, "any individual employee or a *group of employees shall have the right* at any time to present grievances to their employer."

As to labor-organizations, it may be said that the Act bristles with provisions recognizing their existence and protecting their rights. And that is necessarily so: For, although the right of self-organization and collective bargaining is given to individuals, the *exercise* of those rights is, in its very nature, a *collective act of an organization.* The entire purpose of the Act would, therefore, be defeated if these organizations were deprived of the right to assert these rights and enforce them in their collective capacity of organized bodies. In other words, the rights created by the statute here under consideration are not abstract, but *concrete*; and the statute must be construed in a manner to give these rights real substance by permitting the organizations upon whom they are conferred and who are the only ones that can assert them in the first instance, to assert them throughout the existence of the controversy and until they shall have been fully vindicated.

So, Section 8 of the Act not only makes it an unfair labor practice,—

> "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or *discourage membership in any labor organization.*"

but also,—

> "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

In other words, it is not only the individuals who are protected in the full and free exercise of their right to self-organization, but *the organizations created by these individuals are protected against discrimination.* And not only by discrimination which acts upon individuals, but also by discrimination which does not affect individuals but organizations as such, as by discrimination against one organization by giving financial aid to its rival.

And it is to vindicate the very right thus conferred by the Act upon it, and now embodied in a decree *secured by it*, that Petitioner is now knocking at the doors of the courts. For, as already stated, the decree entered by the Circuit Court of Appeals, upon the mandate of this Court, directs the Respondents to—

> *"Cease and desist from:* Discouraging membership in United Electrical and Radio Workers of America."

It is this right, thus embodied in a decree of court, that Petitioner sought to enforce in the Court below by asking the Court to examine its claim that the decree had been violated; and if that claim be found to be correct, to punish its past violation and prevent its violation in the future.

(b) THE POWERS CONFERRED UPON THE NATIONAL LABOR RELATIONS BOARD ARE NOT IN DEROGATION OF THE RIGHTS CONFERRED BY THE NATIONAL LABOR RELATIONS ACT UPON INDIVIDUALS, GROUPS AND ORGANIZATIONS. NOR ARE ITS POWERS EXCLUSIVE, EXCEPT TO DETERMINE, IN THE FIRST INSTANCE, WHETHER AN UNFAIR LABOR PRACTICE HAD BEEN COMMITTED, AND TO PRESCRIBE THE REMEDY THEREFOR.

There is only one other possible argument against the right of Petitioner to enforce the decree already secured by it in the courts, and that is that there is some specific provision of the National Labor Relations Act which militates against it. Needless to say, there is no such specific provision; and those arguing on the other side are therefore reduced to the necessity of arguing from implications. We have already pointed out that whatever implications there

may flow from the nature and design of the Act are clearly in favor of the existence of the right in the Petitioner rather than against it. We may now see what possible arguments are deducible from its specific provisions.

We have already pointed out that unfair labor practices are not made "unlawful" by the National Labor Relations Act. Not being public wrongs, there is certainly no reason why their prevention should be placed in the hands of an administrative agency, except as a forum wherein they may be properly vindicated. That has been done. The litigation already had, had conclusively established by court decree that Respondents had deprived *this Petitioner* of the rights guaranteed to it by law, and *Respondents were ordered and decreed to cease from continuing that violation.* What is there in the Act that prevents the Petitioner from seeking the enforcement of this decree? *Nothing.*

The statement that the Act places the protection of Petitioner's rights as embodied in the decree of court exclusively in the hands of the National Labor Relations Board is merely another way of saying that there is nothing in the Act which specifically gives the Petitioner that right to institute the proceeding. That, we respectfully submit, is not enough.

In fact, we doubt very much whether the National Labor Relations Board has the power to protect the Petitioner's rights by a motion to punish for a *civil* contempt as distinguished from its right to ask the Court to protect its dignity by punishment of the Respondents as for *criminal* contempt. But assuming, for the purpose of this argument, that the National Labor Relations Board has the right to move to punish for civil as well as for criminal contempt, clearly that is no reason why the Petitioner should not have the right to proceed for the redress of its own grievances by a motion to punish for civil contempt,—*the only way in which its own grievances may be properly satisfied.*

And in considering the question whether or not the rights of Petitioner may be left safely in the hands of the National Labor Relations Board, it must be borne in mind that,—again unlike the Federal Trade Commission,—there is no

duty imposed by the Act upon the National Labor Relations Board, except the ordinary duty, imposed upon all courts, to act judicially when it does act. There is nothing in the National Labor Relations Act corresponding to the provision of the Federal Trade Commission Act, which not only *empowers* but *directs* the Commission to prevent unfair trade practices. The reason is not far to seek,—the National Labor Relations Board is not a public *prosecutor*, but a *court*.

C. The National Labor Relations Board is an Industrial Court.

We respectfully submit, that upon careful examination it will be found that the National Labor Relations Board was intended to be an industrial court of first instance.

As already pointed out, the National Labor Relations Act does not define any public wrongs, and does not establish any public prosecuting agency to prosecute wrongdoers. There are no Public Wrongs defined in the Act, and there are therefore no *prosecutions* thereunder. The Act, as its declaration of purpose clearly indicates, was intended to declare industrial rights, and to create a court of first instance in which those rights may be vindicated. Because of the nature of the rights declared, and the litigants involved, it was found necessary to clothe this special court with certain special powers not possessed by ordinary courts; and to create a procedure somewhat different from that of ordinary courts, so that the special class of litigants expected to resort to it may not go without remedy either because of the litigants' want of means to carry on litigation in an ordinary court, or because of the lack of facilities in ordinary courts to investigate the industrial problems involved. For the same reason, and because of the public interest involved, this special court has been clothed with power, having judicially established certain rights to turn Petitioner in the regular courts and move for the enforcement of its judgments. But although great powers have been conferred upon it, it was not made its *duty* to protect either the public at large or any individual or groups against a violation of the rights created

by the Act. No more than a District Court of the United States which is given *power*,—i. e., *jurisdiction*,—to vindicate certain rights, has the duty of becoming a grand jury looking for the punishment of the violators of such rights. The failure to place upon the National Labor Relations Act the *duty* to prevent unfair labor practices, in the same manner as the duty is placed upon the Federal Trade Commission Act to prevent unfair trade practices, was therefore no oversight on the part of Congress. On the contrary: It is part of the congressional intent to make the National Labor Relations Board a court of first instance.

In this connection, we respectfully submit that it is rather odd that the very groups of persons who have in the past vociferously attacked the National Labor Relations Board for acting both as prosecutor and judge, and have sought the enactment of amendments to that Act which would separate those functions, now come before this Court seeking to deprive the real litigants of the opportunity of vindicating their private rights, by asking this Court to give the Act a narrow construction, utterly unwarranted either by its general nature or any of its specific provisions, which would enlarge and emphasize the Board's character of prosecutor.

We shall see further below that more is involved than the mere question as to *what agency* shall enforce the rights created by the National Labor Relations Act. But even if this were purely a question of the choice of agency, we respectfully submit, that, in consonance with our system of law, the real litigants ought to be given the opportunity to independently vindicate their rights.

POINT III.

The National Labor Relations Act not only creates private rights but gives the parties upon whom these rights are conferred status in the courts for their vindication.

The argument thus far has proceeded on the assumption that the National Labor Relations Act is actually devoid of any indication as to the intent of Congress on the subject here under consideration,—in whose keeping the protection of the rights thereby secured should be, in so far as the problem of the right to *move for their protection* is concerned. But such is not, in fact, the case: *The National Labor Relations Act expressly gives the parties upon whom the rights are conferred the right to take whatever steps they deem necessary for their protection, and does not leave their protection solely to the National Labor Relations Board.*

A. The National Labor Relations Act expressly gives private parties the right to move.

We shall see further below that this is quite different from,—in fact, exactly the reverse of,—the provisions of the Federal Trade Commission Act. And also that there were special reasons for making the provisions of these Acts different. At this point, however, we are concerned only with the provisions of our Act as they are, and we shall therefore proceed to examine them.

The first thing to be noted in this connection is the language of Subsection (b) of Section 10 of the Act, dealing with *charges*. The first part of that subsection is as follows:

> "Whenever *it is charged* that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue and cause to be served upon such person a complaint stating the charges * * * and containing a notice of hearing before the Board * * *"

Two things are to be noted about this provision: First, that the Board is simply *given power* to issue a complaint and hear the matter. This provision is in effect merely a provision conferring *jurisdiction* upon the Board, similar to provisions conferring jurisdiction upon other courts of the United States. *It is a grant of power to hear and determine.* As already pointed out, no duty is imposed upon the Board to move of its own accord. The second thing to be noted is that the provision clearly contemplates somebody other than the Board making the charges,—*a moving party,* whose charges are to set the Board machinery in action. Whenever *"it is charged"* the Board shall have power to move. This, it may be noted here, is in striking contrast to the provisions of the Federal Trade Commission Act which contemplates the Commission *itself* making charges, as well as the Commission moving of its own accord.[6]

The foregoing clearly shows the Legislator's intent as to the entire scheme or mode of operation of the semi-judicial machinery set up by the Act, and is merely preliminary to the provision which seems to us decisive on the point here under consideration. Those provisions are contained in Subsection (f) of Section 10, which are as follows:

> *"Any person aggrieved* by a final order of the Board granting *or denying* in whole or in part *the relief sought* may obtain a review of such order in any Circuit Court of Appeals * * * by filing in such Court a written petition praying that the order of the Board be modified or set aside."

This subsection not only contemplates *a party seeking relief,* just as Subsection (b) contemplates *a party making charges,* but specifically gives such party standing in court. It in fact puts the party making the charges on exactly the

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[6] The corresponding provisions of Section 5 of the Federal Trade Commission Act (given more fully further below in the text) are as follows:

> *"Whenever the Commission shall have reason to believe* * * * it shall issue * * * a complaint stating *its* charges."

same plane or level as the party against whom the charges are made. This is not merely a provision giving persons *against* whom an order has been made by the Board the right to appeal from such order, but gives a party who was *denied relief* by the Board the right to come to the Circuit Court, not only independently of the Board but *against the Board*, asking the Court to give him the relief which the Board has denied him. Nor must the denial be entire,—it is sufficient that the Board has failed to give a party *all* the relief which he considers himself entitled to, to enable him to ask the Court for relief.

We respectfully submit that there could be no more explicit recognition of the independent right of a party to vindicate his rights in the courts independently of the Board.

And this explicit provision becomes particularly significant when we *contrast* it with the provisions of the Federal Trade Commission Act, with the practice under which, we are told, the procedure under our Act should be *assimilated*. Those provisions not only do not recognize any aggrieved party in the sense of our Act, and, therefore, the decision of the Commission final against such "aggrieved person," but, under the decisions of this Court, *a decision of the Commission in favor of an "aggrieved person" is insufficient to sustain a "cease and desist" order.*

Federal Trade Commission v. *Klesner*, 280 U. S. 19.

B. The respective provisions of the Federal Trade Commission Act and of the National Labor Relations Act are different because of a difference in the prior state of the law in the fields which they, respectively, cover.

We must not conclude, however, from the language of the Federal Trade Commission Act, or from the language of the opinions of this Court interpreting that Act, that the law is disregardful of private rights. On the contrary, as was pointed out in an earlier portion of this brief, the law is particularly careful of private rights, and "No Right Without a Remedy" is a fundamental principle of equity jurisprudence. Therefore, when the Congress has, in the Federal

Trade Commission Act, legislated without consideration for the private rights of persons injuriously affected by unfair trade practices, and this Court has held, in the case just cited, that—

> "Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs."

it was not because either Congress or this Court considered private rights unimportant, or that it would be consistent with the genius of our law to leave the protection of such rights to the absolute discretion of an administrative agency. We respectfully submit, that nothing more contrary to the genius of our law could possibly be suggested. The real reason is not far to seek. Indeed, it is shown in the passage of the opinion of this Court from which we have already quoted,—namely, *that the private party was not without remedy for the redress of his private wrongs.*

It must be borne in mind that long before the Federal Trade Commission Act was adopted any person injured by an unfair trade practice could come into court and obtain relief for the wrong thus inflicted upon him. "Unfair competition" is, indeed, an established branch of our equity jurisprudence. No statute was necessary in order to give relief for private wrongs of this class. Nor was it necessary to create a special forum for the litigation of the private rights involved, or a special agency for their enforcement. It was, therefore, perfectly proper for Congress to deal exclusively with the public wrongs involved, and to create a public agency to take care of the public interest only. By doing so, it did not disregard the private rights involved,—it merely left them in the keeping of the private parties, *who are as free now as they were before the enactment of the Federal Trade Commission Act to enforce them in the courts by private suit.*

And that is all that this Court has said in *Federal Trade Commission* v. *Klesner.* This Court certainly did not say that Sammons, Klesner's competitor, could not come into court

asserting his private rights. All that this Court said was that the Federal Trade Commission Act did not create an administrative remedy for the redress of these private rights, *in addition* to the ordinary remedy given by the equity courts. Nor was Mr. Sammons before this Court urging upon this Court his private rights.[7] The only parties before this Court were the Federal Trade Commission and Klesner. And this Court very properly said that the Federal Trade Commission had no business to interfere in a purely private quarrel which involved no public interest. Said this Court, in the concluding paragraph of its opinion in that case:

> "The undisputed facts, established before the Commission, at the hearings on the complaint showed affirmatively the private character of the controversy. It then became clear (if it was not so earlier) that the proceeding was not one in the interest of the public; and that the resolution authorizing the complaint had been improvidently entered."
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> *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 30.

But when we turn to the question of unfair labor practices, we are in an entirely different legal field. We must start out with the recognition of the fact that not only have private rights been created by Section 7 of the National Labor Relations Act, *but that the National Labor Relations Board was specially created as a forum for the litigation and enforcement of those rights.* The *purpose* of the statute we

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[7] We do not mean to suggest that if Sammons had come to this Court, *in that proceeding*, urging his private rights upon this Court, the decision of this Court would have been different. But he was not before this Court because he was not, and had no right to be, in the Court of Appeals of the District of Columbia, which rendered the decision under review in the *Klesner* case. And he had no right to be heard in *that* court because the Federal Trade Commission Act, dealing exclusively with public wrongs, did not give him that right.

are dealing with its therefore exactly the reverse from the statute involved in the *Klesner* case. It is, therefore, utterly absurd to say that the administrative agency in question was not created for the purpose of enforcing private rights. *If that were true the National Labor Relations Board would have no more right to move for the punishment of Respondents than has Petitioner.* For the question in the *Klesner* case was not, *who* may move for the enforcement of the private rights there involved, *but whether those rights may be enforced at all.* The real meaning of the decision of this Court in the *Klesner* case, as we read it, is that the Federal Trade Commission had no right to enforce Mr. Sammons' private rights,—that that must be left to Mr. Sammons himself by means of the usual action in a court of equity.

But there is no other way in which Petitioner, or the other parties whose grievances were adjudicated and a remedy provided for in the decree in question, can come into court seeking the enforcement of those adjudicated rights except by means of a proceeding to punish the offenders for contempt of court. Concededly, no separate action could have been brought to enforce those rights in the first instance. Resort must be had, in the first instance, to the administrative proceeding provided by the Act. And if the interpretation placed upon the Act in the court below be correct, no independent proceeding may now be brought in a court of equity for the enforcement of the rights secured by the decree of court which was the result of the invocation of the administrative remedy. If, therefore, the interpretation of the Act contended for by Respondents and embodied in the order appealed from be correct, we arrive at the utterly absurd conclusion that by assimilating the practice under the Labor Relations Act to the practice under the Federal Trade Commission Act, a "public agency," which this Court has said in the *Klesner* case has no right to seek the enforcement of private rights, is the only agency which may seek the enforcement of the private rights created by our Act.

But far more important than the absurdity involved, is the great injustice to the parties which is involved in that conclusion. For, unlike the complainant in the *Klesner* case, Petitioner has no other forum to which it may resort for the enforcement of its rights.

In answer to this we are told that the National Labor Relations Board is there to take care of our private rights. Aside from the fact that this is contrary to the decision of this Court construing the statute with the procedure under which our Act is to be assimilated, we are stared in the face with the statement of this Court in the case under that Act *that the discretion of the Board is final.* And in order that there may be no mistake about it, and that the Respondents' position actually is that the enforcement of our rights depends upon the *absolute discretion* of the Board, one set of counsel opposing our application for certiorari, said in their brief that, upon their interpretation of our Act,—

> "* * * the individual or union upon whose complaint the Board acted by instituting the proceeding, *has not the slightest right to require the Board to apply to the Court* for the enforcement of its Order."
>
> (Brief submitted by Messrs. Lobe Straus and Claude A. Hope, p. 15.)

This, from counsel who were particularly insistent in urging upon this Court in the earlier stages of this litigation *the peculiar sanctity of private rights.*

POINT IV.

The provisions of the National Labor Relations Act and those of the Federal Trade Commission Act further contrasted, and the law of unfair competition and that of unfair labor practices considered.

It would seem to us that in view of the express provisions of the Act giving parties seeking relief against unfair labor practices, standing in court for the purpose of obtaining

that relief, independently of, and even in despite of contrary action by, the Board, it is hardly arguable that such parties have no standing in court to enforce a decree actually obtained by them. But in view of the fact that the court below thought it proper to assimilate the procedure under the National Labor Relations Act to that under the Federal Trade Commission Act, as if the Acts were *similar*, we deem it proper to examine further into the provisions of the latter Act. And, we respectfully submit, that such examination will show that, far from being similar, the provisions of the two Acts are in striking *contrast* to each other.

We have seen that the provisions of our Act contemplated a moving party outside of the Board itself, upon whose charges the Board is to act and sit in judgment; while the Federal Trade Commission Act does not contemplate any complainant moving the Board to action by his charges of unfair trade competition, and that the Board itself is to act upon its own charges. But a close examination of the wording of the decisive portion of the Federal Trade Commission Act will show that it expressly excludes private parties and their rights from consideration as a moving cause for the action of the Commission, *and expressly limits it to a consideration of the public interest.* And this Court has expressly held that the protection of the private rights is not in itself sufficient to create a "public interest."

The portion of Section 5 of the Federal Trade Commission Act (U. S. Code, Title 15, Sec. 45) dealing with the procedure of the Commission reads as follows:

> "Whenever the Commission shall have reason to believe that any such person * * * has been or is using any unfair method of competition in commerce, and *if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public,* it shall issue and serve upon such person * * * a complaint stating *its charges* in that respect, and containing a notice of a hearing."

In other words, the only consideration upon which the Commission may act under the express provisions of this statute *is the public interest*, and it is its determination upon that subject that is decisive. Two more dissimilar statutes than the one just quoted and our own Act can hardly be imagined. And it is because of this specific provision of the statute that this Court has held, in the case relied upon by Respondents, both below and in their brief in opposition for the application for a *writ of certiorari*, that the Board cannot be moved into action by the injury to a private party.

Federal Trade Commission v. *Klesner*, 280 U. S. 19.

That the decision of this Court in the case just cited was based entirely on the particular wording of the statute just quoted is clear from the opinion of this Court in that case. In that opinion, delivered by Mr. Justice Brandeis for a unanimous court, this Court said:

> "The provisions in the Federal Trade Commission Act concerning unfair competition are often compared with those of the interstate commerce act dealing with unjust discrimination. But in their bearing upon private rights, they are wholly dissimilar. The latter act imposes upon the carrier many duties; *and if creates in the individual corresponding rights* * * *"
>
> "While the Federal Trade Commission exercises under Section 5 the functions of both prosecutor and judge, the scope of its authority is strictly limited. A complaint may be filed only 'if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public.' This requirement is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they have been deceived—the evidence commonly adduced by the plaintiff in 'passing off' cases in order to establish the alleged private wrong * * * But to justify the commission in filing a complaint under Section 5 of the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. *Public interest may exist although the practice deemed unfair does not violate any private right* * * *

"In determining whether the proposed proceeding will be in the public interest the commission exercises a broad discretion."

Federal Trade Commission v. *Klesner*, 280 U. S. 19, 26-28.

The purpose of the statute being the protection of the public at large, the discretion of the Commission as to whether or not the public interest requires the suppression of a particular unfair trade practice is, as pointed out by the Court in an earlier portion of the same opinion, final.

No person whose private rights have been injured by the alleged unfair trade practice has any standing in court to complain of such decision, because his interests could never have been considered in arriving at the decision. On the other hand, no right of his has been affected, since an adverse decision of the Board does not affect his right to come to court and obtain relief in a private suit.

POINT V.

No enabling act is necessary to permit a party to assert his statutory rights, and such a right may be asserted in ways other than those contemplated by the legislator.

We respectfully submit that no special grant of power by way of an enabling provision is necessary in order that a party may assert his statutory rights in our courts. This is true of our Federal courts as well as of our State courts. There is a difference between the Federal courts and the State courts with respect to *the power of the court* to entertain suits,—our inferior Federal courts being of limited jurisdiction and have only such jurisdiction as is granted to them by Congress. But we know of no distinction between the State and Federal courts with respect to the right of a person to assert his rights, whether general or statutory, in those courts which have jurisdiction of the subject matter. In the nature of the case this question arises but seldom.

But it so happens that this Court has had occasion to pass on this problem in connection with the very rights here asserted, in two notable recent decisions, which we believe conclusively establish our contention.

Texas & N. O. R. Co. v. *Brotherhood,* 281 U. S. 548; *Virginia Ry. Co.* v. *System Federation,* 300 U. S. 515.

Nor is a party limited in the assertion of his statutory rights to the modes contemplated by the Legislature. We do not mean to say, of course, that where the Legislature has, in the act conferring the right, limited its enforcement to a particular forum, thereby specially created for the enforcement or the litigation of such right, the right may be enforced *contrary* to the provisions of the statute. What we say is, that in the absence of any special provision giving a particular agency or court exclusive jurisdiction, the right may be enforced otherwise than provided by the Legislature. And that, even when the problem was in contemplation of the Legislature at the time of the shaping of the statute, and the mode in which it is now sought to enforce it discarded or rejected for reasons which would make the given mode of enforcement not *contrary* to the express intention of the Legislature.

Perhaps the best example of such a situation is that which was presented to this Court in connection with the Sherman Anti-Trust Act, when an attempt was made to assert the rights or protection thereby granted in a State court. The Sherman Act does not grant any private rights except under Section 7, which gives the injured party the right to sue in a Federal Court for triple damages. It is elementary, of course, that that action can only be brought in the Federal courts. And this Court has held that under that Act, prior to its amendment by the Clayton Act, no other action could be brought by a private party in the Federal courts.

Minnesota v. *Northern Securities Co.,* 194 U. S. 48.

And an examination of the debates in the United States Senate at the time when the Sherman Act was being shaped in that body, discloses the fact that an attempt was made to amend the Act by providing that an action thereunder could be brought by a private party in the State courts, and that that amendment was rejected.

Nevertheless, this Court has held that the rights given by the Sherman Act to private parties have an existence independent of the special provisions of the Act as to rights of action, and may therefore be asserted in the State courts.

E. Bement & Sons v. *National Harrow Co.*, 186 U. S. 70.

POINT VI.

Certain Statutes Distinguished.

In their brief in opposition to the application for *certiorari* counsel for the Respondents said:

> "If the Congress had intended to confer upon private individuals the right to institute proceedings in Court for any purpose other than review when aggrieved, it would have made express provision therefor, as it did in the following Acts"—

listing four Acts of Congress. We respectfully submit that the assertion is utterly unwarranted,—is, indeed, contrary not only to elementary legal principles, but to the usual practice of Congress; and that an examination of the statutes referred to will show that there were special reasons in each case necessitating special provisions with respect to private rights. An examination of those statutes will show that the provisions therein contained with respect to private rights were not mere grants of right to go to court, but provisions giving special remedies, or choices of remedies, or limitations in connection with a choice of remedies. In other words, these special cases but prove the general rule that no special grant is needed for the enforcement of a statutory right in the ordinary ways known to the law.

A. The Interstate Commerce Act.

The first of the Acts thus referred to, in point of time of enactment, is the Interstate Commerce Act; and the special section to which we are referred is Section 9 of that Act. The section in question provides as follows:

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any District Court of the United States of competent jurisdiction; *but such person or persons shall not have the right to pursue both of said remedies,* and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."
>
> Interstate Commerce Act (U. S. Code, Title 49). Sec. 9.

It is clear that the reason for the provision is not that without it private parties could not sue for the protection of their rights. It is obvious that the provision became necessary by two special circumstances: Shippers having been given the right to present their claims for adjudication by the special agency created by the Act, it became necessary to state that that was not a substitute but *an additional* remedy. And, having provided two remedies, it became necessary to state whether they were *concurrent* remedies or merely *a choice* of remedies.

B. The Shipping Board Act.

The next Act in point of time of enactment is the Shipping Board Act. The provisions relating to the enforcement of orders of the Shipping Board or suits thereon in case of an award of damages are too voluminous to reproduce here. But an examination of these provisions, we respectfully submit, clearly show that the reason for the provisions is their special character, and not the supposed necessity for a spe-

cial grant of power to apply to the courts for the protection of one's rights, or the fear of Congress that if no specific provision were made the courts would not enforce the rights of private parties on their own application or suit.

U. S. Code, Title 46, Secs. 828, 829.

C. The Packers and Stockyards Act.

The next Act we are referred to is the Packers and Stockyards Act, and the sections of the Act cited are 308 and 309. The first of these sections reads as follows:

> *"Liability to individuals for violations; enforcement generally.* (a) If any stockyard owner, market agency, or dealer violates any of the provisions of sections 205, 206, 207, or 208 of this chapter, or of any order of the Secretary made under sections 201 to 217 inclusive of this chapter, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.
>
> "(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 210 of this chapter, or (2) by suit in any district court of the United States of competent jurisdiction; *but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."*

U. S. Code, Title 7, Sec. 209.

The other section referred to is too voluminous to be reproduced here in full, and it is clear that none but its last subdivision could have been in mind of learned counsel for the Respondents. That subdivision reads as follows:

> "If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides

or in which is located the principal place of business of the defendant or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit."

U. S. Code, Title 7, Sec. 210, Subd. (f).

Here, again, it is clear that the reason for inserting the provisions is their special nature, which includes a large choice of remedies as well as a special statute of limitations,—and not the fear of Congress that unless a special grant to enforce the rights given by this Act were contained in the Act the courts would refuse to enforce the Act at the instance of the parties upon whom the rights are conferred.

D. The Fair Labor Standards Act.

The fourth Act which we are referred to is the Fair Labor Standards Act of 1938, and the section of the Act cited is Section 16(a). This is clearly a printer's error, and the subdivision which counsel must have had in mind is Subdivision (b), which reads as follows:

"Any employer who violates the provisions of section 206 or section 207 of this charter shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, *and in an additional equal amount as liquidated damages.* Action to recover such liability may be maintained in any court of competent jurisdiction *by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such*

employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow *a reasonable attorney's fee to be paid by the defendant, and costs of the action.*" (Italics ours.)

U. S. Code, Title 29, Sec. 216(b).

Here, again, it is clear that it is the special nature of the provisions that made their insertion necessary, and not the fear or opinion of Congress that unless special provision were made therefor the courts would not enforce the rights granted by that Act *in the ordinary way and manner,* in accordance with established legal practice and procedure.

POINT VII.

The position of the Board, its powers, and the problem of policy.

In pursuance to our policy to give notice to all the parties named in the joint caption of the two consolidated proceedings in which the original decree was entered, we gave notice of the application which resulted in the order appealed from to the National Labor Relations Board. The Board appeared and filed what it called a "Response" which appears at pages 62-63 of the record. The "Response" being brief, we reproduce it herewith:

> "Comes now the National Labor Relations Board, by its attorneys, and, for the information of the Court, states its position on the motion made by Amalgamated Utility Workers to punish the Consolidated Edison Company of New York, Inc. and its Affiliated Companies for contempt of court, as follows:
>
> "1. Upon examination of the affidavits filed in support of the motion, the Board suggests that sufficient cause has been shown to warrant an appropriate investigation, pursuant to order of this Court, concerning whether Consolidated Edison Company of New

York, Inc. and its Affiliated Companies have committed acts in violation of the decree of this Court entered March 21, 1938, as modified by the order of this Court entered January 21, 1939.

"2. The Board stands prepared to participate in such investigation as this Court may deem appropriate and herewith offers its services in such capacity as the Court may direct by its order.

"Wherefore, the Board respectfully suggests that the Court make and enter herein an order directing that such investigation be held as the Court may deem appropriate in the premises."

The court will note that the Board considered the papers filed by Petitioner sufficient to require the court below to grant the relief if not controverted or to make inquiry into the correctness of the allegations if challenged. It apparently did not consider itself in duty bound to make further investigation, or to have the power to make such investigation unless specially empowered by the court. This position, we respectfully submit, is strictly in accord with the provisions of the statute.

This has nothing to do with the power of the Board to *move the Court* to action; which, as we have indicated above, is unquestioned as far as a motion to punish for criminal contempt is concerned, although its right to move to punish for a civil contempt may be questioned. But the right to *move* and the right to *investigate*,—that is to say to investigate *both* sides of the question,—are entirely different matters, which counsel for the Respondents seem to have confused. In their brief in opposition to the application for *certiorari*, counsel for the Respondents said:

"Investigation and ascertainment of the facts by the responsible public agency should *precede* resort to the Court with the charge of contempt."

And in a footnote, counsel referred to an address made by Mr. Charles Fahy, the General Counsel of the Board, who signed the "Response" above set out, in which Mr. Fahy

described the investigation which the Board usually institutes before filing a formal complaint, as the kind of investigation that the Board ought to undertake before making a motion to punish for contempt.

We respectfully submit that the learned counsel have confused the different provisions of the National Labor Relations Act; and that if the Board had attempted to do what counsel said was the proper procedure herein, the same counsel would probably be the first to deny the right of the Board to do so. The procedure described by the General Counsel of the Board in the address referred to and quoted from on the last page of the brief of counsel for the Respondents in opposition to *certiorari*, is that which is provided for by Section 11 of the National Labor Relations Act. That section commences as follows:

> *"For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by Section 9 and Section 10 * * *"*

A reference to Sections 9 and 10 will show that there is one kind of hearing and one kind of investigation that the Board is empowered to conduct. Under Section 9(c) the Board may investigate any controversy "concerning the representation of employees," as a preliminary to certification of an exclusive bargaining agency. And by Section 10 the Board is empowered "to prevent any person from engaging in any unfair labor practice affecting commerce, and to conduct a hearing for that purpose." Under the three sections taken together, the Board has the power to conduct any investigation which may be necessary *either to determine* a question of representation, *or to prevent* an unfair labor practice. In the first case the investigation may be either for the purpose of determining by the investigation itself who is entitled to representation, or as a preliminary to the ordering of an election. In the second case the investigation is preliminary to a formal complaint and hearing thereon, so as to determine whether there is any basis for formal complaint and hearing. But a motion to punish for

contempt is neither an investigation nor a hearing to be conducted by the Board. According to counsel's own theory, it is nothing but an application to the court for enforcement of its order. And this Court has, upon the urgent plea of counsel for employers, definitely determined that after the Board has certified the record to the Circuit Court of Appeals,—either upon a petition for enforcement or upon a petition to vacate—the Board has lost all jurisdiction of the matter, and can act thereafter *only in pursuance to an order or direction from the Circuit Court of Appeals.*

Ford Motor Co. v. *N. L. R. B.*, 305 U. S. 364.

Indeed, there never was any question of the fact that the Board could not of its own motion carry on any investigation of,—nor indeed do anything about,—a case after the certified record has been filed in the Circuit Court of Appeals. The Act itself specifically says that after the certified record has been filed in the Circuit Court of Appeals, the jurisdiction of that court shall be *exclusive*.

National Labor Relations Act, Sec. 10(e).

The only question litigated in the *Ford* case was, therefore, whether the Circuit Court of Appeals had power to remand the matter to the Board upon the Board's own application and without the formal reversal of its order. And we can very well imagine the cries of "usurpation" and the appeals to "due process" that would arise if the Board were to attempt to conduct a real investigation into the activities of the Respondents herein in an effort to determine whether or not it ought to move to punish the Respondents for contempt. Of necessity any action by the Board would be limited to the hearing of the only side that it could possibly hear under the circumstances,—namely, the side that would apply to it for action. And that the Board has already done, and has certified that in its opinion the papers submitted by the Petitioner state a *prima facie* case upon which the court ought to act.

Assuming, therefore, that something in the nature of a "certificate of public interest" were necessary under our Act, similar to the determination of "public interest" which is required under the Federal Trade Commission Act, we respectfully submit, that even that formality has been complied with in this case.

This brings us to the problem of policy. Of course, no considerations of policy ought, or could, deprive a person of his right to apply to the courts for a redress of grievances or violation of his rights. But if the question were open, we respectfully submit that it ought to be determined in favor of the right of labor-unions to move to punish for contempt the violators of the decrees of the courts in which their rights have been settled, rather than remit them to the action of the Board,—making the enforcement of their rights dependent upon the vicissitudes which surround the action of the Board. In this connection we respectfully submit for the consideration of the Court the well-known fact,—now a matter of public knowledge and official documentation,—that the National Labor Relations Board is woefully under-staffed and terribly behind time in the determination of matters which are within its exclusive cognizance under the provisions of the National Labor Relations Act. It must also be borne in mind that persons in the position of the Respondents herein have insisted before this Court that where the action of an administrative agency is required by law the function cannot be delegated to subordinates but must be performed by the heads of the agency itself, and this Court has so ruled.

Morgan v. *United States*, 304 U. S. 1.

The kind of investigation described by Mr. Fahy in the address quoted from by counsel for the Respondents on the last page of their brief, on the application for *certiorari*, would certainly not meet those requirements. And there can be no doubt of the fact that if this Court should hold that

a decision by the Board as a public agency is necessary as a preliminary to a motion to punish for contempt, counsel for the Respondents herein would be among the first to insist that the decision must be that of the Board itself. We know that the Board is so overburdened with its present labors that it takes from six months to a year in important cases from the time of the hearing to the time of decision. Under these circumstances, it is practically impossible for the Board to do more work than it does now, and the casting upon it of additional burdens under the ruling appealed from would increase the delay in the original decision of cases by the Board as well as in its attempt to enforce the same by motions for contempt. Indeed, it is quite clear that the sole purpose of the objection on the part of Respondents to the right of Petitioner to move, is the knowledge that if the right to move were to be lodged exclusively in the Board, Respondents would get an indefinite delay in the enforcement of the decree, during all of which time it would not only violate the same but so entrench its position that thereafter it would be utterly impossible to dislodge it. If ever it was true in any case, it is certainly true in this case that—

"Justice Delayed is Justice Denied."

CONCLUSION.

For all of the above reasons, and in order to make the National Labor Relations Act a living force and not a dead letter, the order appealed from should be reversed.

Dated, New York, December 11, 1939.

Respectfully submitted,

LOUIS B. BOUDIN,
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CHARLES ELMORE CROPLEY
Clerk

Supreme Court of the United States

October Term, 1939.

No. 342.

AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATION,

Petitioner,

against

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

REPLY BRIEF FOR THE PETITIONER.

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REPLY BRIEF FOR THE PETITIONER.

Statement.

There are certain things about the briefs submitted on behalf of the respondents which require a preliminary statement before answering some of the arguments presented therein.

The brief submitted on behalf of Consolidated Edison contains so many inaccuracies and misleading statements that it would require entirely too much space to correct them. Most of them relate to the question of the "participation" or "standing" of Petitioner in the main case, and are more

annoying than important. We shall therefore not discuss them in the body of this brief. But for the information of the Court, in the event that the Court should consider any of these matters important, we print in a series of appendices at the end of this brief, containing—(a) a complete abstract of the proceedings in the main case, showing the *titles* of the case at its different stages and nature and extent of the participation of Petitioner and its counsel therein; (b) a quotation in full of a colloquy between the trial examiner and counsel which furnished the peg upon which counsel have hung their preposterous claim that Petitioner was excluded by the Board from participation in the proceedings before the Board; and (c) facsimile reproductions of the covers of the briefs submitted by both sets of counsel when this case was last before this Court, showing what they thought of Petitioner's standing in the case.

More important is the fact that both sets of counsel, in their respective briefs, while starting out with a recital of the fact that the Petitioner has stipulated not to bring up any matter other than its standing in court to move for the punishment of Consolidated Edison for a violation of the decree entered in the main case, proceed to devote a considerable portion of their space, if not actually most of it, to a discussion of the alleged merits of the controversy which Petitioner sought to bring before the court. Both sets of counsel devote a considerable portion of the introductory matter of their brief to statements which can only bear on the question of merits, which *were not considered below*, rather than the question of the right of Petitioner to move the case for trial, *which is the only question now before this Court.*

We must commend the straightforwardness of counsel for I.B.E.W. who, in the argument itself, segregate the argument on the merits into a separate section (pp. 22-29), which permits us to give notice that we disregard it,—which we accordingly do. Counsel for Consolidated Edison, however, insinuated the argument on the merits into the argument about Petitioner's standing and the two arguments are so

intermingled that it is utterly impossible to segregate them, which puts us at the disadvantage of seemingly admitting facts which are really denied, while all that we intend to do is to ignore an argument which we believe does not properly belong to the present stage of the case, but should be reserved for the time when, as we hope, the merits of this case will be discussed before the Circuit Court of Appeals, or before this Court on appeal from the decision of that court by either side after the merits shall have been inquired into by the court below and decision rendered thereon. We have therefore found it necessary, while never *arguing* the merits, to point out that certain matters argued or asserted in the briefs of counsel on the other side appertain to the question of merits and not to the question of standing.

POINT I.

The "standing" of Petitioner in the main case.

In our main brief we stated that Petitioner was a party to the main suit which resulted in the decree alleged to have been violated by Consolidated Edison. In answer to this, counsel for Consolidated Edison in their brief make repeatedly the assertion that Petitioner was not permitted to participate in the original hearing before the National Labor Relations Board, and that its participation after the entry of the formal order permitting it to intervene was "limited" either by that order or by the nature of the application of its counsel which resulted in the entry of that order. The first is contrary to the fact; and the second utterly unwarranted.

As already stated, both of these matters are dealt with in detail in the appendices annexed to this brief. But we deem it important to quote right here the official statement of the National Labor Relations Board as to the extent of the participation of Petitioner and its counsel in the proceedings before that Board. Aside from the listing of Messrs. Louis B. Boudin and Sidney Elliott Cohn as counsel for the

United (the designation under which Petitioner was then known) in the list of counsel, following the title of the proceeding and preceding the text of its decision, the Board says in the body of the decision itself, in the preliminary statement of the formal proceedings—

> "Pursuant to the amended notice, a hearing was held at New York City on June 3, 10, 11, 14, 15, 16, 17, 23, 24 and July 6, 1937, before Robert M. Gates, duly designated as Trial Examiner by the Board. *The Board, the respondents, and the United were represented by counsel and participated in the hearing.*"
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> 4 N. L. R. B., 73.

POINT II.

Time to lay a ghost—and to settle an important question of procedure under the National Labor Relations Act.

Throughout their briefs, both sets of counsel refer to the I.B.E.W. as the "majority union"; and counsel for Consolidated Edison repeatedly state that the I.B.E.W. locals "indisputably" represented the vast majority of its employees both at the time of the original hearings before the Board as well as at the time of the application to the Circuit Court of Appeals to punish for contempt. It is our contention that this matter is utterly irrelevant to the question now before this Court. We believe it is irrelevant even to the merits of the application below as we view the law, but if relevant at all it goes to the merits of the application and not to the standing of Petitioner in making it. We should therefore consider it proper to ignore this statement. Unfortunately, we have done so on a former occasion,—with rather disastrous results, and are therefore fearful of doing so again. Particularly, since we are forcibly reminded of our mistake on the former occasion by the fact that counsel on the other side actually quote the decision of this Court in the main

case as authority for the assertion of fact just referred to in so far as it relates to the situation as it existed at the time when this matter was before the Board for adjudication on the charge of unfair labor practice filed by Petitioner. We feel, therefore, compelled,—much to our regret,—to make a brief statement with respect thereto.

(a) *As to the present membership status of the rival unions.*

It is our position that as a matter of law the present relative strength of the two unions is of no relevancy to the *merits* of the application in the court below. If it is, the place to *litigate* the question is in the court below. Clearly, this matter cannot be considered by this Court, after the court below has sustained the contention of the respondents *that the merits ought not to be gone into* because the Petitioner has no standing to bring the question to the attention of the court. That this was a matter for *litigation* in the court below is self-evident. At the points we are now considering counsel for Consolidated Edison do not say that the matter is *undisputed.* Instead they say it is not "disputable". What is "disputable" is a matter of opinion. On the other hand, what is or is not *disputed* is a question of fact: *And counsel for Consolidated Edison know that the matter is very hotly disputed as a matter of fact.*

It is also denied in this proceeding as a matter of law (Civil Practice Act [N. Y.], Sec. 243).

(b) *The I.B.E.W. never was a majority union.*

We now come to the ghost that must be laid,—the alleged lost of 30,000 members which the I.B.E.W. is supposed to have had at the time of the Board's decision. Again we say, that it is our position that this matter is utterly irrelevant to the merits of the application in the court below; and if it were relevant, that was the court in which the question should have been litigated. But at this point we are met

with the assertion that this Court has already passed on that question. If that were so, the matter could not, we take it, be litigated in the court below. This makes it important that we discuss the matter here, since otherwise we would be precluded by that contention if we do get the chance to try this case on the merits in the court below.

In support of the amazing contention that this Court had *decided* that the I.B.E.W. had 30,000 members,—when the question had never been litigated and as a matter of fact it never had even half that many,—we are cited to a passage of the opinion of this Court in the main case. The exact language of counsel for Consolidated Edison is as follows:

> "* * * the I.B.E.W. is the labor organization of which a large majority of the respondents' employees were *undisputedly* members at the time of the prior proceedings (305 U. S. 197, 232)" (Brief for Consolidated Edison, p. 7).

As the Petitioner had at no time admitted that a majority of Consolidated Edison's employees were members of the I.B.E.W., and the matter had been continuously and vociferously disputed all along, counsel could not have possibly used the word "undisputedly" unless they meant to assert that that *dispute* was settled by the decision of this Court, and that such decision is contained on the page of the opinion of the court indicated. This brings us to a consideration of the passage of the opinion of this Court indicated by counsel for the Respondents, and how it came to be there.

As appears from the record in the main case, the taking of testimony was closed on June 24, 1937, except for the testimony of Consolidated Edison's witnesses Carlisle and Dean, whose testimony was agreed to be taken, and was taken, on July 6, 1937. Up to that time no one had taken the stand, either on behalf of the Respondent companies or on behalf of I.B.E.W., to give any account or offer any estimate of the latter's membership among Consolidated Edison employees. When Mr. Carlisle was on the witness

stand,—*on July 6, 1937*,—he was asked by his counsel the following question, on direct:

> "Q. Did you—do you know or does the management of any company know how many of its employees belong to the I.B.E.W.? A. *I do not. I do not know myself.*"

Thereupon the examination continued as follows:

> "Q. And the I.B.E.W. furnished the company information as to the membership of its local unions among your employees? A. It has.
>
> Q. I show you this sheet and ask if that is a copy of the data which has been furnished to the management by the I.B.E.W.? A. That's right.
>
> Judge Ransom: I offer it in evidence.
>
> Trial Examiner Gates: There being no objection, it will be received.
>
> (Document referred to received in evidence and marked Respondent's Exhibit 16, Witness Carlisle.)" (Transcript of Record, p. 1212).

"Exhibit 16" in that case, as appears from page 1418 of the same Record, purports to be a tabulation of membership without any signature or authentication of any kind or nature whatsoever. And it should be noted that Mr. Carlisle specifically stated that he did not know what membership I.B.E.W. had among Consolidated employees, notwithstanding the fact that he had that paper-writing in his possession all along. *In other words, Mr. Carlisle was not taking responsibility for its correctness.*

We shall see further below why neither counsel for the Board nor counsel for Petitioner object to its introduction n evidence. What we are concerned with at this point is he use that has since been made of it by counsel for the ther side, and to urge upon this Court the necessity of calling a halt to that use or abuse.

The ghost of the alleged host of 30,000 members first appeared in the briefs of counsel for the other side, in which he matter was referred to as if it were a fact. We thought hen, as we do now, that this claim of membership was of

no legal significance; and we didn't argue the matter, although in the preliminary statement, of preceding the argument, we did call attention, in a footnote to the fact that there is no proof in the record as to the numbers of this alleged host. We have since learned that we were in error in not arguing the point,—for the court having determined that the matter was of legal significance, assumed that the statement of fact in the brief of counsel for the Respondents that the record contained *proof* of the alleged 30,000. That assumption was apparently due to the fact that no objection had been raised to the introduction of this paper in evidence, coupled with the manner in which this was brought to the attention of this Court in a reply brief to which we had no opportunity to answer,—which in fact we did not read until after the argument.* The wording of the passage in question is as follows:

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* The reply brief in question was handed to counsel for United in the courtroom of the Supreme Court when the case was about to be called for argument; and since under the rules there is no provision for a sur-reply, the brief was put aside and was not actually read until after the argument. And since counsel did not think the matter of legal significance, no attempt was made to counteract in any way what they believed to be an undeserved slur on the contents of their brief as well as a misleading statement as to the contents of the record. The reply brief contained an appendix headed "Summary and Refutation of Matters of Fact Misstated in the Brief for the United," but actually contained what was apparently meant to be "deadly-parallel" columns of alleged misstatements of fact in the briefs of both United and the Board. Among the alleged misstatements in the brief for the United was supposed to be the statement in the footnote referred to in the text, which appeared on page 19 of our brief. The statement in the parallel column set opposite to the quotation from our brief read as follows:

> "*The court below found as a fact*, from the evidence, as to the Brotherhood, that 'As of June 29, 1937, their membership was 30,000 out of 38,000 eligible employees' (R. 1745). The *details of the proofs* are in

> *"It also appears from the evidence, which was received without objection,* that the Brotherhood and its locals comprise over 30,000 or 80 per cent of the companies' employees out of 38,000 eligible for membership."
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> *Consolidated Edison v. N.L.R.B.*, 305 U. S. 197, 232.

It thus appears that we must share the blame for the fact that "Exhibit 16" became a part of the record in the original case, and are therefore at least partly responsible for this imaginary host of 30,000 members of the I.B.E.W. among the Consolidated Edison employees. But, we respectfully submit, that that is no reason why this imaginary host should be permitted to continue to occupy the battlefield, and to play a role as if it were a real host and not an imaginary one. *It certainly never had any existence in fact.*

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evidence as Respondents' Exhibit No. 16 (R. 1418). This exhibit was received in evidence *without objection* from counsel for the Board (R. 1212), who did not cross-examine as to it or offer any rebuttal. The Board's decision did not question the accuracy of the facts shown in Exhibit No. 16 (R. 101)." (Last italics in original) (pp. 26-27).

Needless to say, there was no more finding of fact by the court below than there was by this Court. The court below made no findings. The reference is to a portion of the opinion of the Circuit Court of Appeals in which the court said, not by way of finding, but apparently as a matter which was either undisputed or not important enough to be disputed, "As of June 29, 1937, their membership was 30,000 out of 38,000 eligible employees." And the context shows that not only was the court not making a finding, but it apparently didn't think the matter of particular importance, since not a word is said about the significance of this fact. And, as this Court well knows, the court below sustained the entire order of the Board, thus clearly showing that *it did not consider this fact of legal significance.* But this Court was clearly led to believe that the Circuit Court of Appeals had made an actual finding of fact based on *"detailed proofs"* appearing in the record.

(c) *Must counsel object to the admission of documents which have no probative value on pain of being held to have admitted the correctness of their contents?*

The question raised by the ghost membership of I.B.E.W. is important not only because the time has come to put a stop to its potentiality for mischief in the further progress of this case, but also because it raises the very important question of the duties of attorneys trying cases before the National Labor Relations Board. When this matter came to trial before the National Labor Relations Board in June and July, 1937, we were under the impression that neither technical rules of evidence nor the technical rules of procedure governing trials in other courts were applicable in proceedings before the Board. Objections of counsel to the admission of evidence were, therefore, looked upon more in the nature of requests to the examiner not to burden the record with immaterial matter; and, when overruled, no exception was deemed necessary in order to preserve one's rights. That technical rules of evidence should not apply is provided for by the Act itself. And it is clear that the Act could not be properly administered if they were to apply. Evidence is therefore offered and admitted "for whatever it is worth." Worthless matter certainly does not acquire probative value by being put into the record. And we respectfully submit that worthless matter does not cease to be worthless because it went into the record without objection being offered to its admission. If we are in error on that, the sooner we find it out the better for the profession as well as for those charged with the administration of the Act.

But we respectfully submit, even under the stricter rules of evidence, such as govern the trials in equity courts, our failure to object to this utterly worthless piece of paper did not give it any probative force. Nor should we even be criticized for having failed to object to it. For, as a matter of fact, there were very good reasons for our failure to object. It must be remembered in this connection *that the paper was not being offered as proof of its contents.* On the contrary, Mr. Carlisle distinctly disclaimed any knowledge of the mem-

bership either by him or by the management of Consolidated Edison, even though they had the paper all along. It was being offered merely for the purpose of showing that a certain claim had been made by I.B.E.W. We need not go into the question as to whether or not we could have objected on the score that it was inadmissible even for that purpose. Suffice it to say, that we didn't care to be technical as to the form in which Consolidated Edison may prove that a certain claim had been made by I.B.E.W. The question therefore arises, was it our duty to object to the introduction of proof of that *claim?* And as to that, we respectfully submit, that the question whether or not the fact of such claim was relevant to the issues was at least arguable. And, we further respectfully submit, that in such situation prudent counsel for the Board or for a complaining union should not object to proof of the fact that such claim was made and run the risk of a reviewing court holding that the employer had not been given an opportunity to prove the entire situation as it presented itself to him at the time when he is alleged to have committed an unfair labor practice. It must be borne in mind that employers are continuously confronted with situations where conflicting claims are made upon them by rival labor unions. Under such circumstances, we respectfully submit, it is perfectly proper for an employer to prove what claims had been made on him by either union before he determined what course of action to take. And it would be unfortunate if it were held that the failure to object to the evidence that a certain claim had been made was tantamount to an admission of the correctness of the claim, or that the proof of the claim had any other probative value than that such a claim was made.

We respectfully submit that even in ordinary courts of law, and especially in equity courts, it is very common to introduce in evidence a notice of claim, and the admission of such notice is never considered proof of anything but the fact of claim even when the notice is admitted without objection. A familiar instance is that of the admission into evidence of the filing of a notice of lien in an action to enforce it. Notices

of lien are properly admissible into evidence. *But no one has ever claimed that the failure of counsel for defendant to object to the admission of such notice is proof of the amount due as claimed in the notice. Certainly no court ever so held. And that even though such notices are usually sworn to.*

We respectfully submit that our failure to object to the admission of the utterly worthless piece of paper known in the main case as Exhibit 16 gave it no probative force. And the time has come to shoo that imaginary army off the record. For even if it were decided that Petitioner has no standing, and the Board make a motion to punish for contempt, it would be met by the same ghost army of 30,000 unless this Court does something to make it incapable of further mischief.

POINT III.

The questions what Consolidated Edison did and whether it had a right to do it relate to the merits of the application, with which this Court has no concern on this review.

Considerable space of the Consolidated Edison brief is devoted to a discussion of the questions as to what Consolidated Edison is charged with doing, whether, as a matter of fact, it did those things, and whether it had a right to do those things which it admits doing.

We respectfully submit that none of these questions are pertinent on this appeal. All of them relate to the *merits* of the application to the court below; and must, therefore, be directed to and argued in the Circuit Court of Appeals in the first instance. Had the court below granted us a hearing on the merits, the arguments now addressed to this Court might have been properly addressed to that Court; and in case of a decision adverse to them respondents might have been entitled to have them reviewed by this Court. The court below having refused to hear the application on its

merits, it is clear that the merits cannot be argued in this Court, since this Court has no original jurisdiction in the matter and its power is concededly limited to a review of the action of the court below. No decision having been made by the court below on the merits, the merits cannot be argued in this Court.

POINT IV.

The question as to what relief, if any, petitioner was entitled to is likewise not before this Court.

In addition to devoting a large portion of their brief to the questions noted under the preceding point, the briefs on the other side devote some space to the question of the relief sought by petitioner in the court below, and to a discussion of the question whether or not petitioner was entitled to that relief under the decision of this Court in the main case.

We respectfully submit that that question is also not before this Court on this appeal. The question whether there has been a violation of a decree of the Court is usually a mixed question of law and fact. It may, under certain circumstances, be purely a question of fact, and under others purely a question of law. Such is clearly not our case, since some of the questions of fact alleged in the petition are controverted by the respondents, and others are claimed to have been done in pursuance to the decree of this Court "upholding" Consolidated Edison's contract with I.R.E.W. None of these questions, we respectfully submit, can be argued on this appeal. Even the questions of law cannot be reviewed in this Court before they had been considered and determined in the court below. It is clear that the question of law as to what relief petitioner is entitled to could not possibly be considered by this Court in advance of any determination in its favor, upon a dismissal of its petition on the ground that it is not entitled to *any* relief for lack of *standing*.

It is elementary that the prayer for relief is not part of the cause of action, and the question of what relief a plaintiff would be entitled to cannot be discussed upon a dismissal of

a complaint, since the dismissal of the complaint decides that the plaintiff is not entitled to *any* relief. Upon an appeal from a judgment dismissing a complaint or sustaining a demurrer thereto, the question whether or not plaintiff was entitled to *all* of the relief prayed for is clearly not germane to the question under review.

Squiers v. *Thompson*, 172 N. Y. 652.

The question of the relief to which petitioner would or would not be entitled if the matter of merits had been tried in the court below, would, therefore, not be germane to the question now before this Court even if we were in the position of a plaintiff whose complaint had been dismissed for failure to state a cause of action. A *fortiori* are these matters not germane to the question before the Court in this case in which not only was our complaint dismissed, but it was dismissed not upon the ground that it does not actually state any cause of action, but that we would not be heard no matter what cause of action we stated. In other words, the decision of the court below was, literally, that we could not *come into court.*

The decision of the court below was, *assuming that Consolidated Edison had violated the decree in question, petitioner has no standing in court to present that violation as a grievance upon which it is entitled to be heard.* And that *is the only question before this Court.*

POINT V.

No new findings by the Board were necessary as a preliminary to the application to punish for contempt. Nor was the Board authorized to make any new findings without direction from the Court.

In arguing against the right of the Petitioner to move for the punishment of Consolidated Edison, counsel for that company lay great stress on the alleged necessity of having the Board make findings preliminary to the application to

punish. It is clear that that contention is without merit. Nor would the limitation of the right to move to punish to the Board insure such findings. It is clear that there is nothing in the statute which requires that such findings be made; and, as far as we know no such formal findings were made in any case in which the Board moved. Clearly, the mere petition of the Board to punish is not equivalent to such findings, any more than the formal complaint of the Board is equivalent to findings in the original proceeding, even though the Board of necessity investigates the case prior to making a formal complaint.

It is also clear that many applications to punish for contempt may raise questions of law only,—in which event it would be utterly absurd to require the Board to make "findings". And the present case is an instance in point: If we understand the main argument of our opponents on the question of merits correctly, it is that Petitioner was in fact seeking from the court below an interpretation of the decree involved herein which would amount to an "extension" of the relief granted by that decree. Clearly, that would present a question of law upon which no findings were either required or could possibly be made by the National Labor Relations Board. Surely, it is not for the Board to say what the decree made by the Circuit Court of Appeals under the direction of this Court actually means, but for that Court in the first instance and for this Court ultimately. It would therefore be utterly absurd to submit that question to the Board. We are sure, that had the question been submitted by us to the Board and had the Board attempted to do something about it, either by way of real *investigation* or the making of *findings*, counsel for the other side would have raised the hue and cry that the Board is back at its nefarious practice of hounding the poor employers and the poor A. F. of L. by attempting to reinstate the very portions of its order which the United States Supreme Court had eliminated. A cursory examination of *one* of the questions involved on the application below, which was made a principal issue on the merits in that Court, will illustrate the point.

A. The Board has made all the findings which it is authorized to make under the Act and which are necessary for the determination of the main question of merits presented to the Court below.

We respectfully submit that the Board has made all of the findings which it is authorized to make under the law and which were necessary for the determination of the merits of the application raised in the court below. It must be borne in mind that the only findings that the Board is authorized to make are: (a) whether or not an unfair labor practice had been committed by an employer, and (b) what steps are necessary or proper for the purpose of curing the past offenses or preventing the occurrence of the evil in the future. In this case the Board has found, and the courts have sustained the finding, that Consolidated Edison was guilty of unfair labor practices. The Board also found that certain steps or acts were necessary in order to rectify past injuries and prevent their recurrence in the future. On this point this Court failed to approve one of the Board's findings; and, therefore, eliminated it from the order made by the Board. Just what the action of this Court in that regard meant will be discussed in more detail further below. Suffice it to say here, that this action continued the dispute which was originally tried before the National Labor Relations Board,—Petitioner claiming that Consolidated Edison was now using the decree of this Court as a cloak for the continuance of the most important unfair labor practices originally complained of; while Consolidated Edison claimed that what was previously an unfair labor practice had become permissible under the decision of this Court. That was the main problem before the court below, although not the only one. *But it could have been the only question presented to the court below*,—as is now in effect claimed by Respondents, when they discuss the merits of the application to the court below. Certainly, it would be utterly absurd to say that anything further was necessary to be done by the Board before this question could be presented to the court below in the first instance, or to this Court ultimately on review

of the action of the court below. And the fact that we claimed that there were other questions involved,—namely, that Consolidated Edison was back at its old game of continuing the old unfair labor practices even where it couldn't possibly cover them up with the alleged protection of the decree of this Court, makes no difference. The problem whether or not a labor union has independent standing to bring a question of the violation of a decree to the attention of the Court which has made it, asking for relief, cannot be made dependent on the facts of a particular controversy. It must cover them all, including a situation like the one which respondent claims is actually presented in this case,—namely, a pure question of the interpretation of the decree of the Court.

As to such a situation, it cannot possibly be claimed that any further findings by the Board are necessary. And if such findings are not necessary in *every* case, the principal argument for the necessity of the Board's intervention in *all* cases is completely answered. The legal problem involved must then be resolved by permitting either the Board or the union to come to court, *presenting* its grievance; and it would then be for the Circuit Court of Appeals to decide whether or not further intervention by the Board is necessary.

In this connection, we respectfully submit to the Court that the suggestion by counsel for Consolidated Edison that the alternative was between a preliminary examination and *findings* by the Board, on the one hand, and a decision by the Court on affidavits, on the other, flies in the face of the well-established practice of equity courts on such motions. Where the questions presented are not purely legal and the papers present issues of fact, the usual practice is to either direct evidence to be presented before the Court itself or such evidence to be taken by a master on its behalf. The responsibility is that of the Court to decide for itself whether or not it could decide the matter on the papers before it, or more light was needed, and if so, upon the means whereby that is to be obtained. In this case, the Court could, of course, have availed itself of the services of the Board, since the Board had offered its services. We do not mean to say that such

offer by the Board was absolutely necessary,—that is a question of the interpretation of the Act a decision upon which is not necessary for the determination of the question before the Court. One thing is clear, however, that the Board itself could not proceed to make either any *real investigation*,—i. e., an actual trial of the issues of fact, if there were any,—or any *findings*, except upon the order or direction of the Court.

Ford Motor Co. v. *N.L.R.B.*, 305 U. S. 364.

B. *The principal question presented to the Court below was one on which the Board could not, with propriety, make any findings.*

The utter absurdity of requiring findings by the Board as a condition of the right to apply to the Court for relief in the event of a violation of a decree such as is involved herein becomes even more apparent when the main controversy on the merits is considered. We shall not discuss those merits here, but merely point out what the controversy was about, in order to illustrate our contention that the main prop of the argument on the other side for limiting the right of moving to the Board cannot possibly sustain the weight of the edifice which it is intended to support. We have already called the attention of the Court to the fact that a large part of the controversy below, perhaps its most important part, turned around the question whether what Consolidated Edison did was in *pursuance* of the decree or in *violation* thereof. That, as we have already stated, is purely a question of law which the Board could not possibly pass upon. But behind that question of law, there lay a question of opinion as to the kind of relief the particular situation demanded, which made the Board particularly diffident* in

* Counsel for Consolidated Edison say in their brief that our papers show that our application was made without the Board having passed upon its propriety, and it is broadly hinted that the reason was that the Board would probably have disapproved of such application. As we view the law, that question is not of the slightest importance on the ques

moving in the matter, since it presented a point of difference between it and this Court. For it must be remembered that the most important matters complained of on this application are claimed by the respondents to have been done by them under the portion of this Court's opinion which is supposed to have "upheld" their contracts with the I.B.E.W. which the Board had ordered discontinued or "disestablished".

It will be recalled that at the last day of the original hearing before the Board (except for the special session on July 6th for the taking of the testimony of the witnesses Carlisle and Dean) Consolidated Edison produced certain contracts which it claimed to have entered into with I.B.E.W. while the hearings before the Board were pending. The Board having found that Consolidated Edison and I.B.E.W. entered into a scheme to deprive the employees of Consolidated

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tion now presented to this Court for review. But having been taught by past bitter experience not to disregard certain matters because of our own notions as to what is or isn't before the Court on an argument, we take this occasion to state that, as a matter of fact, our application was made upon the advice of the General Counsel for the Board, who was of the opinion that Petitioner had the right to make such an application, and that it would be *advisable* that it should do so. Whether counsel for the Board was actuated in giving this advice by a desire to save the Board labor or the workers involved delay in bringing their grievances to the attention of the Court, or because he did not care to have the Board charged with an attempt to enforce a portion of its order which had been eliminated by this Court, is, of course, a matter on which we can have no opinion. We may point out, however, that while we are now being charged with attempting to "extend" the decree obtained by us, there can be no doubt of the fact that had the Board brought the present proceeding, it would have been charged with much worse offenses,—in all probability with attempts to enforce orders which this Court had disapproved. And we certainly cannot blame the General Counsel for the Board, in view of the present concerted attack upon the Board on all sides, in being rather *diffident* about bringing the proceeding when counsel for the union involved were ready to do so.

That the failure on the part of the Board to act was *not* due to any doubt as to the propriety of initiating such a proceeding is sufficiently proven by the text of its "Response".

Edison of their rights of self-organization and collective bargaining, and viewing the course of conduct of Consolidated Edison from the day of the announcement by Mr. Carlisle, the Chairman of its Board, while the concededly company unions were still in existence and I.B.E.W. had practically no members among the Consolidated employees, that he "recognized" the I.B.E.W. as the collective bargaining agency for all of the Consolidated employees, and up to and including the signing of the contracts in question, as one continuous attempt to deprive the Consolidated employees of their right to collective bargaining, concluded that those contracts must be "disestablished" as part of the relief which the situation demanded. It was of the opinion that that step was absolutely necessary in order to make real collective bargaining possible.

4 N.L.R.B. 71, 94.

The Circuit Court of Appeals was of the same opinion, but this Court disagreed and ordered that portion of the Board's order eliminated. *Why* this Court eliminated that provision, and what the elimination of that provision *actually meant*, gave rise to the main difficulty which necessitated the application to the court below. Briefly stated, the contentions of the respective parties were these:

Petitioner claimed that in directing the modification of the order of the Board, this Court was actuated by two considerations: (a) the fact that no issue had been properly raised with respect to those contracts, and that, therefore, the Board could not invalidate them as an independent decision, since no trial of that issue had been had; and, (b) that such disestablishment was not necessary for the purpose of giving proper relief as to the unfair labor practices which had actually been tried and as to which Consolidated Edison had actually been found guilty, since the contracts in question on their face claimed to apply only to I.B.E.W. members and not to be "exclusive" contracts,—i. e., contracts entered into by an exclusive bargaining agency pur-

posing to represent all of the employer's employees.* The Respondents, on the other hand, claimed,—or at least so we interpret their claim,—that this Court had actually tried the issue involved in our attack upon the contracts in question and sustained them after such trial. Respondents then correlate this supposed *decision* of this Court with this Court's supposed *finding* of fact that I.B.E.W. represented 80% of Consolidated Edison's employees, and from the combination of the two they deduced the right to consider as *exclusive* the contracts which they had claimed before this Court only related to I.B.E.W. members.

The main charge presented to the court below by Petitioner, around which all the other charges revolved and to

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* The pertinent portions of the opinion of this Court are as follows:

"Apart from this question of notice to the unions, both the companies and the unions contend that upon the case made before the Board it had no authority to invalidate the contracts. Both insist that that issue was not actually litigated, and the record supports that contention. The argument to the contrary that the contracts were necessarily in issue because of the charge of unfair labor practices against the companies, is without substance * * * But the Board says that on July 6th (the last of the contracts having been made on June 16th) the companies amended their answer, stating that the making of the contracts had rendered the proceeding moot, and that this necessarily put the contracts in issue. We cannot so regard it. We think that the fair construction of the position thus taken on the last day of the hearings was entirely consistent with the view that the validity of the contracts had not been, and was not, in issue * * *

"Nor did the contracts make the Brotherhood and its locals exclusive representatives for collective bargaining. * * * They simply constitute the Brotherhood the collective bargaining agency for those employees who are its members * * *

"The employers' practices, which were complained of, could be stopped without imperiling the interests of those who for all that appears had exercised freely their right of choice." 305 U. S. 234-238.

which they were subsidiary, was that Respondents proceeded *as if* this Court had decided that the contracts in question were such as, under the Act, only an exclusive bargaining agency may make or enforce. That such claim was actually made by Respondents, or at least seemed to us to have been made, is shown by Mr. Carlisle's affidavit, to which frequent,—and as we believe improper,—reference is made on the briefs for the Respondents. In that affidavit Mr. Carlisle says:

> "About a month after the entry of this Court's Order of January 21, 1939, the I.B.E.W. complained to the Companies that the I.B.E.W. was not being accorded the status to which it was entitled, under Section 9(a) of the Act *and the Opinion of the Supreme Court*" (R. 32).

The Court will recall that Section 9(a) of the Act deals with contracts which may be made only by *exclusive bargaining agencies*. That sub-section is as follows:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be *the exclusive representatives of all the employees* in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

Clearly, at least the I.B.E.W. claimed that under the decision of this Court, it was entitled to be the exclusive bargaining agency for all of Consolidated Edison's employees. And since there is no question of the close collaboration between the I.B.E.W. and the Consolidated Edison Companies, there is at least a fair inference,—certainly worthy of inquiry by the court below as to its correctness,—that Consolidated Edison Companies were actually proceeding *as if* I.B.E.W. were *the exclusive bargaining agency for all Consolidated Edison employees.*

That the main reliance of both Consolidated Edison and I.B.E.W. was on the decision of this Court is self-evident, when we bear in mind the law of our subject. It is not only

clear from the Act itself but settled by adjudication that an exclusive bargaining agency cannot, in any event, be constituted under Section 9(a) by the action of the employer and a labor union, no matter what the proportion of that particular employer's employees are members of the labor union in question, for that section of the Act has no reference whatever to the number of employees of a *particular employer* whom the union represents, but the number of employees in a *particular unit* the union represents; and the Act itself provides that the National Labor Relations Board is the only agency that can determine what is a proper unit, *and that it must do so in each and every case.* This is likewise too explicitly stated in the Act to permit of any argument. The Act says in Subdivision (b), which immediately follows upon the provisions of Subdivision (a) just quoted:

> "The Board shall decide *in each case* whether in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

That the two subdivisions just quoted mean just what they say,—namely, that the mere fact that a certain labor union represents a majority, or even all, of the employees of a particular employer, does not make that union the exclusive bargaining agency for the employees of that employer,—has been recently decided in a well-considered opinion by the Court of Appeals of the District of Columbia, with the apparent approval of this Court, since this Court did not express any dissent from those views, although the case was up for review in this court.

> *Fur Workers Union* v. *International Fur Workers Union*, 105 F. (2nd) 1, affirmed by this Court, Dec. 11, 1939.

Also, if reliance were had merely on the provisions of the Act itself, there would have been no occasion for Mr. Carlisle in his affidavit in the court below to refer to the "opinion of the Supreme Court." Clearly, therefore, what Respondents relied on as their main defense in the court below, in so far as the merits were concerned, was the opinion of this Court as interpreted by them. And it is this question, we are now told, Petitioner could not argue in the court below without previous investigation or findings by the Board.

That Congress could not have intended such an absurdity is self-evident. Of course, had Congress expressly said what counsel for the Respondents say it said, that would have been the end of the matter. We do not claim that this Court has any power to change the Act. And we certainly do not ask it to do so.

What we claim is that everything in and about the Act, *and every principle of our legal system*, with which the lawmaker is presumed to be familiar and have in mind, require the conclusion that Congress had intended that the rights granted by it to workers and workers' organizations should be enforced at their behest; and that when it had been finally established, through a long and laborious process, that their rights had been invaded, and a decree entered which commands cessation of such invasions, the workers and the workers' organizations for whose protection these rights have been declared, may apply to the court making the decree for its *effective* enforcement.

And anyone who seeks to place upon the Act an interpretation which would defeat that purpose has the burden of proving it by better arguments than such as would make nonsense of the Act, thereby assuming that Congress did not know what it was about.

POINT VI.

That the Board could move to punish for a civil contempt, if it can do so under the act, is no argument against petitioner having that right.

In our main brief we had expressed some doubt as to whether the National Labor Relations Board could move to punish a violator of an enforcement decree as for a civil contempt, as distinguished from criminal contempt. In their answering briefs, counsel for Consolidated Edison go to considerable length to prove that the Board has that right. We are not disposed to quarrel with that, even though the arguments presented do not seem to us conclusive.* For our part, we wish the Board had that power, for an examination of the records in which the Board has actually moved to punish a violator of an enforcement decree for contempt shows that all of them were cases in which the labor unions making the charge had not seen fit to, or could not afford the expense, of making themselves parties to the enforcement proceedings either in the Circuit Court of Appeals or in this Court; and it would be a pity if the Board could not, in such a case, move either by way of criminal contempt or civil contempt, as may be best for the interest of the workers involved. The right of the labor union directly affected to move to punish a violator of an enforcement decree is no more incompatible with a similar right in the Board than is the right of the labor union to make itself a party to the original

* Since the receipt of the brief of counsel for the Consolidated Edison we have reread the opinion of the Circuit Court of Appeals for the Seventh Circuit in the case of *Federal Trade Commission* v. *McLean* (94, F. [2d] 802) and the opinion of this Court in *McCrone* v. *U. S.* (307 U. S. 61), and we are not prepared, without further study of the records and briefs in the two cases, to say whether or not this Court intended to overrule the decision of the Circuit Court of Appeals in the *Federal Trade Commission* Case or merely to distinguish the *McCrone* Case, since in that case the United States was acting as a private party.

enforcement proceeding brought by the Board. While the statute expressly gives the right to be heard only to an "aggrieved party",—i. e., a party aggrieved by the order of the Board,—it has been recognized both by the Board and the courts that the statute implicitly recognizes the right of the union which preferred the charges to be heard *alongside and independently of* the Board in any proceeding to enforce its own rights or the rights of its members.

POINT VII.

The application to the court below which resulted in the order under review was made in the enforcement proceeding to which petitioner actually was a party.

The last legal proposition advanced by counsel for Consolidated Edison, is, that an application to punish for a civil contempt is merely a continuation of the main suit; and in a case like the present one it is merely a step in the enforcement proceeding. In that they are undoubtedly correct, and the two cases cited by them in this connection seem to us to dispose of any doubt as to the right of this Petitioner to make the motion which resulted in the order now under review. These cases are:

Gompers v. *Bucks Stove and Range Co.*, 221 U. S. 418.

N. L. R. B. v. *Hopwood Retinning Co.*, 104 F. (2d) 302.

It is therefore sufficient for us to refer to those two cases, and to make the very quotations which counsel on the other side make from the opinions in those cases in order to definitely dispose of the arguments on the other side. In the first of these cases this Court said:

> "Proceedings for civil contempt are between the original parties, and are instituted and tried as a part of the main cause."

Gompers v. *Bucks Stove and Range Co.*, 221 U. S. 418, 444-445.

And in the second case cited the Circuit Court of Appeals for the Second Circuit * said:

> "As a proceeding for civil contempt, this is therefore properly a continuance of the earlier action in this Court *and is a step in the enforcement of our previous judgment.* Hence it was correctly instituted by motion served upon the counsel appearing for the parties in the record."
>
> *N. L. R. B.* v. *Hopwood Retinning Co.*, 104 F (2d) 302, 305.

And since that case has been cited as authority by the other side, and as also relied upon by us, we may call the attention of the Court to the fact that in that case, although the Board was the movant, the Court found it necessary to refer the matter to a special master in order to make the *findings* which the Court found it necessary to have made before it gave its decision. The disposition of that case made by the unanimous Court was:

> "An order will be entered adjudicating John A. Hopwood, the Hopwood Retinning Co., Inc., and the Monarch Retinning Co., Inc., in contempt of the order of this Court of July 26, 1938, and the proceeding will be referred to Walter H. Pollak, Esq., of New York City, as special master, to make *findings* and file his report after due *hearing.*"
>
> *N. L. R. B.* v. *Hopwood Retinning Co.*, 104 F. (2d) 302, 305.

This, it would seem to us definitely disposes of both, the argument from the necessity of findings and the argument from the necessity for a hearing.

It would also seem to us that the two cases just cited dispose of the question before this Court,—at least as far as the present case is concerned, since we were an actual party to the main action or enforcement proceeding in the Circuit Court of Appeals as well as in this Court.

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*But the Bench being differently constituted, and the Court speaking through Judge Clark.

As already stated, the appendices to this brief contain a full statement of the various steps in the litigation from the time of the filing of the complaint to the final decision of the matter in this Court; and that record shows that at each step in the litigation, whether before the National Labor Relations Board or before the courts, Petitioner (under its former name of United) was recognized as a party and accorded full standing as such. It appearing by its own counsel and made independent arguments whenever its counsel deemed it necessary,—which actually was whenever any question of law arose and argument was required. It also shows that our opponents, the very counsel who now appear before this Court on the other side, recognized the full standing of Petitioner as a party throughout the proceedings, and so entitled their briefs throughout (this being in accordance with the official title which the case has had throughout), and gave Petitioner's counsel notice of every step they made in the proceeding describing Petitioner either as "intervenor" or "respondent" or both, as the case may be. We shall therefore not burden this Court by reciting these matters here, but shall limit ourselves to the citation of the last entry on that long record,—which shows the standing accorded to Petitioner by this Court. That entry relates to the appearances at the argument when the cause was last before this Court, and is as follows:

> "Mr. Louis B. Boudin, of New York City, argued the cause and filed a brief for *respondent* (intervener) United Electrical and Radio Workers of America."
>
> *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197.

POINT VIII.

Certain Cases Distinguished.

It is manifestly impossible to discuss here all of the cases cited by the two sets of counsel on their respective briefs. Fortunately, wherever cases are not merely cited but actually

quoted from, their inapplicability to the case at bar becomes manifest. Some cases are cited, however, without quotation from opinion, and with the general statement that they hold something or other which is applicable to our case. We shall limit the discussion here to two of these cases,—one in this Court and one in the Circuit Court of Appeals for the Seventh Circuit. They are fair samples of the manner in which cases are cited on the briefs of counsel for the other side, but the reason for picking them out of the rest is that they are cited more than once,—the case in this Court being cited twice, and the case in the Circuit Court of Appeals no less than four times,—showing that counsel for the other side considered them particularly important. In fact, at one place counsel say that the case in the Circuit Court of Appeals just referred to holds the very proposition laid down in the order here under review. In addition to those two cases, we shall also consider the other four cases cited on page 29 of the brief of counsel for Consolidated Edison, which, they claim show that the Courts of Appeal of the Fifth, Sixth, Seventh, and Ninth, Circuits are in accord with the decision of the Court of Appeals of the Second Circuit as embodied in the order here under review.

A. *The Doctrine of the Sprunt Case.*

The case from this Court referred to is that of *Sprunt & Son v. U. S.*, 281 U. S. 249, which is supposed to have held all kinds of things militating against our position. We respectfully submit that that case does not contain anything which in the remotest degree contravenes any position we have taken in this case, or which in any way militates against the rights asserted by Petitioner herein. In order to make this discussion as brief as possible, we shall simply quote that portion of the opinion of this Court in that case from which counsel for respondent have quoted an isolated sentence, or rather, half sentence. That passage is as follows:

> "Such a suit (i. e., a suit to vacate an order of the Interstate Commerce Commission) can be

brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier. In the case at bar, the appellants have no independent right which is violated by the order to cease and desist. They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled. The advantage which the appellants enjoyed under the former tariff was merely an incident of, and hence was dependent upon, the right, if any, of the carriers to maintain that tariff in force and their continuing desire to do so.

"Why the carriers filed the new rate structure now in force is no concern of the appellants. If the carriers had done so wholly of their own motion, obviously these shippers would have had no ground of complaint, before any tribunal, unless the new rates were unreasonable or unjust. If they were believed by the appellants to be so, a complaint before the Commission would be the appropriate remedy."

Sprunt & Son v. United States, 281 U. S. 249, 255-256.

B. *The Doctrine of the Blankenship Case.*

The second case referred to is that of *Blankenship v. Kurfman* (96 Fed. 2nd 450); and even more than the *Sprunt* case, it is cited for all kinds of propositions,—including the proposition that Petitioner has no standing in court to move for the punishment of Consolidated Edison for contempt. As a matter of fact, all that that case decides, is, that an action by one labor union against another, for an injunction in a jurisdictional dispute, involves a "labor dispute" within the meaning of the Norris-LaGuardia Act. Just what that has to do with our case is difficult to understand. And it

is apparent that the only excuse for citing it four times, and expressly including it in the list of cases which are supposed to show that other Circuit Courts of Appeal have held the same doctrine as that of the Second Circuit, as laid down in the order here under review, is a doctrine which may be called the doctrine of *in extremis*, sometimes availed of by counsel,—but always strongly disapproved by the courts,—of citing isolated sentences out of their context if the language used apparently gives color to the contention of the counsel making the quotation.

In this case, the situation was the one presented to this Court when present counsel last appeared before this Court, where counsel for a labor union attempted to argue that the National Labor Relations Act had abrogated the Norris-LaGuardia Act. In answer to that contention, the Court of Appeals said:

> "The general purpose of the National Labor Relations Act is to provide methods of preventing or eliminating certain 'unfair practices' which have heretofore characterized the relation of employer and employee, and which have obstructed, or tended to obstruct, the free flow of commerce. The act creates certain rights and duties as between employer and employee and provides the procedure necessary to give effect thereto. It seems clear that the only rights which are made enforceable by the act are those which have been determined by the National Labor Relations Board to exist under the facts of each case; and when these rights have been determined, the method of enforcing them which is provided by the Act itself must be followed. And we find no provision in the act which can be construed as intending to create rights for employees which can be enforced in federal courts independently of *action* by the National Labor Relations Board."
>
> *Blankenship* v. *Kurfman*, 96 F. (2d) 450, 454.

It is clear that the "action" referred to by the court means the kind of action as has already been taken by the Board in this case. In other words, it supports the position which we took and argued at considerable length in our brief in

the *Fur Workers* Case,—namely, that a labor union and the employer cannot get together and enter into a contract on the plea that the contracting union represents a majority of the employees of that employer, and, therefore, allegedly within the provisions of Section 9(a) of the National Labor Relations Act, and thereupon apply to the courts for an injunction to restrain the competing union on the ground that it is engaged in a violation of our Act. That that position does not in any way militate against the position of the Petitioner herein is self-evident. On the contrary, as appears from an earlier portion of this brief, it is our contention that the doctrine of the *Fur Workers* Case cited in an earlier portion of this brief, which is also the doctrine of the *Blankenship* Case, is an important prop to our position in the court below, when the merits of this case come to be heard, although it has no relation whatever to the legal problem now before this Court.

C. *The cases decided under the National Labor Relations Act which, it is claimed, support the contention of the other side.*

There are four cases decided under the National Labor Relations Act, which, counsel on the other side claim, are applicable to the case at bar. We shall discuss these cases in the order in which they were decided, since some of the later cases referred to the earlier ones as authority.

In this order, the cases are as follows:

Agwilines, Inc. v. National Labor Relations Board, 87 F. (2d) 146.

National Labor Relations Board v. *Carlisle Lumber Company*, 99 F. (2d) 533.

National Labor Relations Board v. *Hearst*, 102 F. (2d) 658.

National Labor Relations Board v. *Colten, et al.*, 105 F. (2d) 179.

A mere glance at the reporter's headnotes to these cases clearly demonstrates the fact that the problem now before

this Court was not involved in any of them. But it is claimed, however, that these cases lay down the general proposition that the National Labor Relations Act does not create any "private rights",—from which, it is claimed, it necessarily follows that the order appealed from was right. We need not discuss here the question of the logical necessity of the conclusion sought to be drawn from the major premise, since an examination of the cases will clearly demonstrate that no such major premise was laid down in any of them.

The first of these cases, the *Aquilines* Case,—Circuit Court of Appeals, Fifth Circuit, December, 1936,—dealt with the problem of the alleged unconstitutionality of the National Labor Relations Act by reason of the power granted to the Board to order back pay without a trial by jury. In this connection the court said:

> "A short and simple answer to this contention is found in the fact that as between employer and employee the statute confers no right of action triable by a jury or otherwise. No provision in it authorizes an employee to make claim. The act does not purport to confer, it does not confer, private rights. It is only to rights and remedies as they were generally known and enforced at common law by jury trial that the amendment applies."
>
> *Aquilines Inc.* v. *N. L. R. B.*, 87 F. (2d) 150.

It is clear that "private rights" was used by the court as synonymous with *right of action at common law*. At any rate, that was the only question involved in the case, and *dictum* on any other point would be *obiter*, if any such *dictum* had actually been made. Clearly, there are many private rights and private suits to which the constitutional provision there under consideration does not apply.

In the second case cited, the *Carlisle Lumber Co.* Case, Circuit Court of Appeals, Ninth Circuit, October, 1938,—the question involved was the extent of the power of the Board to order back pay,—the particular question being whether or not the Board could order back-pay in a case where it had not ordered reinstatement. The decision was

that the Act did not confer a right to back pay which would entitle an employee to such payment apart from and independent of the power given to the Board to prevent unfair labor practice by ordering reinstatement. This case clearly did not deal with the problem as to who may invoke the power of enforcement. The only connection in which the problem of private right was considered was whether the right to back pay was an independent right in the sense that it entitled an employee to payment independently of the prevention of an unfair labor practice. The other question was the power of the Board to order payment without reinstatement as a means of preventing an unfair labor practice. Neither of these questions is before this Court. And what was said there has not the remotest bearing on the problem before us.

The same is true of the third case cited, that of *N.L.R.B.* v. *Hearst*,—Circuit Court of Appeals, Ninth Circuit, March, 1939. That case also involved a problem of the extent of the power of the Board to order back pay,—with respect to the point of time. In that case one of the employees whose reinstatement with back pay the Board had ordered died after the decision of the Board but before the court had made an enforcement order. The question was whether or not the Board could amend its order by directing payment of the back pay to the deceased employee's estate; and if so, up to what time. The decision was that the Board could direct payment of back pay to the deceased employee's estate; but only to the time of the making of its order, and not beyond that. In that connection the court said:

> "The Board intimates that *a private right of action* accrued to Armstrong which survived his death. We think Congress did not intend to create any private right." (Italics ours.)
>
> *N.L.R.B.* v. *Hearst*, 102 F. (2d) 658, 664.

It is clear that here, again, the court used "private right" as synonymous with "private right of action at common law",—which is clearly not the problem before this Court.

And there is certainly nothing in the last case cited which even remotely bears on the matter before this Court. Not only was the problem before the Court in that case entirely different from the problem before this Court, but nothing was said in the opinion in that case that has any bearing whatever upon the present case. The problem before the court in that case was, whether or not an unfair labor practice proceeding under Section 8 against a partnership is terminated by the death of one of the partners, on the theory that *at law* a partnership is a separate entity which is terminated by the death of one of the partners. The answer of the court was in the negative. Counsel for Consolidated Edison quote in a footnote a paragraph from the opinion. We reproduce that paragraph and the next one which shows the context. Together they read:

> "This contention, however, ignores the essential nature of regulatory statutes of the class here considered, and the scope and purpose of administrative orders made in exercise of powers conferred by such legislation. They are to implement a public social or economic policy not primarily concerned with private rights, and through remedies not only unknown to the common law but often in derogation of it. * * *
>
> "In this view of the Act it seems to us unimportant that the proceedings were styled as against Colten and Colman, co-partners, doing business as The Kiddie Kover Company. It is the employing industry that is sought to be regulated and brought within the corrective and *remedial provisions of the Act* in the interest of industrial peace."
>
> *N. L. R. B.* v. *Colten*, 105 F. (2d) 179, 182-183.

It would seem a mere waste of time to attempt to prove that nothing said by the court in that case has the slightest bearing on the problem before this Court. But the fact that counsel on the other side are reduced to the necessity of relying on that kind of cases, we respectfully submit, is in itself proof that their contention is utterly untenable.

POINT IX.

The Securities and Exchange Act Distinguished.

In the brief submitted by counsel for the Consolidated Edison in opposition to our application for certiorari, they referred to four Acts of Congress, as allegedly proving that whenever Congress wanted to create private rights it expressly said so in the act creating those rights. We have discussed those acts in our main brief, showing that there were special reasons for the express provisions of those acts,—reasons which do not apply to our case, and which do not contravene our contention that when rights are created by an Act of Congress, no special provision is necessary in order to make those rights enforceable in our courts. In their brief on this argument, counsel mention another Act in connection with the same argument,—the Securities and Exchange Act.*

An examination of the Securities and Exchange Act (48 Stat. 77; 49 Stat. 129), clearly demonstrates that the reason for the specific provisions indicated by counsel for Respondents were the same which required the insertion of the specific provisions of the four other Acts; and that the arguments which we advanced in our main brief with respect to the other four statutes apply equally as well to the Securities and Exchange Act. The sections pointed to by counsel on the other side are 77-l and 77-t(b). An examination of those sections shows that the reason for inserting an express provision as to the existence of civil liability to the pur-

* Counsel also refer to a section, Section 16(12) of the Interstate Commerce Act, which is one of the Acts mentioned by them in their brief in opposition to certiorari and discussed by us in our main brief. The section of the Interstate Commerce Act referred to in their brief in opposition to certiorari and discussed by us in our main brief (p. 36) is Section 9. They now add Section 16(12). But an examination of the latter section clearly shows that it was inserted because of the presence of Section 9, and that the argument which answers the presence of that section also answers the presence of the latter.

chaser is due to the fact that the standard of proof as well as the measure of liability provided in this Act is different from the standard of proof or measure of liability at common law. Without going into a detailed discussion as to the rather complicated question with respect to the problems of evidence and presumptions which differentiate the provisions of the Securities and Exchange Act from the common law in this respect, it is sufficient to point to the last provision of Section 77-l, which permits the purchaser—

> "* * * to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages *if he no longer owns the security.*"
>
> U. S. Code, Title 15, Section 77-l(2).

We respectfully submit that this provision changes the common law which would be applicable to the situation but for this provision, in two respects: In the first place, it permits the purchaser of the security to recover the purchase price plus interest,—instead of damages as is the rule under the common law in cases of the sale of personal property induced by fraud.* On the other hand, it limits the right to the recovery of damages to cases where the purchaser no longer owns the security,—contrary to the common law rule which gives one induced to purchase personal property by fraudulent representations the right to keep the property and recover the damages.

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* There is, of course, the right of rescission at common law, under certain circumstances. But we believe that the right of rescission given by the Securities and Exchange Act is much broader than that which exists at common law.

POINT X.

Earlier Statutes as Models, and the Problem of "Assimilation."

Much has been said on the other side to the effect that Congress, in enacting the National Labor Relations Act, had in mind particularly the Federal Trade Commission Act, and "modelled" the former upon the latter. We respectfully submit that all such speculations are somewhat idle. Not that earlier statutes have not been thought of by Congress in the enactment of this piece of legislation. But, merely, that it did not do any more so than in any other case. The history of any piece of legislation is of interest in connection with its interpretation, as is the general body of the law of which it was to become a part. But there is certainly not the slightest warrant for the statement that our Act was modelled after the Federal Trade Commission Act. We respectfully submit, with all due respect to those who have made the contrary assertion, that, if anything, our Act was certainly *not* modelled after the Federal Trade Commission Act. It could not very well be in the nature of things. If there was any statute at all after which it was modelled, it was the Railway Labor Act, and not the Federal Trade Commission Act. Not only are the *reasons* obvious, but, we believe, we are warranted in our assertion by the very reports which have been used,—improperly, as we believe,—in an attempt to prove that the Federal Trade Commission Act was the "model" which Congress followed. Lack of time did not permit us to go over very carefully the two reports in question. But upon cursory examination, we have found only one place in the Senate Report in which the Federal Trade Commission Act is referred to, and quite a number of places in which the Railway Labor Act is referred to. Furthermore, the specific reference to the Federal Trade Commission Act in itself proves, at least, that it was not an *exclusive* model, and that in so far as it was a model at all it was only so with respect to procedure before the Board. On the other hand, the Rail-

way Labor Act is continuously referred to as the model for the rights created by the statute. The reference to the Federal Trade Commission Act occurs on page 14 of the Senate Committee's Report (Report No. 573, 74th Congress, 1st Session), and is as follows:

> "*Section 10. Procedure before the Board.*—This is the most important procedural section. Despite the wide-spread charges that the bill invokes novel procedure and vests unusual powers in an administrative agency, the bill is modeled closely upon numerous Federal Statutes setting up administrative regulatory bodies of a quasi-judicial character. The common procedure is so well known that the committee deems it unnecessary in substantiation of this statement to refer to any analogous statutes save the Federal Trade Commission Act, section 5."

It will be noted that the "modelling" is solely with respect to procedure,—and that even as to that "the bill is modelled closely upon *numerous* Federal Statutes."

On the other hand, the Railway Labor Act is referred to in connection with the creation and securing of the right of collective bargaining in Section 7, and in connection with Section 8(a) which prohibits the violation of those rights generally (Report, p. 9).

It would seem to us that this contrast in the use of the two acts as "models" is a sufficient indication as to the manner in which our Act ought to be interpreted. And the other places in which the Railway Labor Act is mentioned only strengthen the conclusion to be drawn from that contrast.

We therefore respectfully submit that the interpretation of our Act, in so far as the basic rights given and secured thereby are concerned, should be guided by the interpretation of the Railway Labor Act,—which means that the procedure under our Act,—except the procedure before the Board,—should be "assimilated" to that under the Interstate Commerce Act, rather than the Federal Trade Commission Act, at least whenever "procedure" means *the right to come into court*. That the Railway Labor Act creates private rights

which the beneficiaries of those rights may themselves vindicate in our courts is unquestioned.

Texas & N. O. R. Co. v. *Brotherhood*, 281 U. S. 548.
Virginian Railway Co. v. *System Federation*, 300 U. S. 515.

CONCLUSION.

It is clear that whether we consider the language of the statute itself, or the nature of the evil which the statute was designed to remedy, or the nature of the remedy provided by the Act for the curing of that evil, we must come to the conclusion that the labor unions making the charges of unfair labor practice and for whose benefit, or for the benefit of whose members, the enforcement decree was made, ought to have the right to apply to the court making the decree to punish the offender for contempt in case the decree is violated. And this is particularly true in a case like the present one, when the union has not only presented the charges and secured the decree, but has actually expended time and money in the securing of that decree, and was represented as a party by its own counsel not only in the securing of the order of the Board but also in securing the decree directing the enforcement of that order.

Dated, New York, January 25, 1940.

Respectfully submitted,

LOUIS B. BOUDIN,
Counsel for Petitioner.

Address of counsel:
20 West 43rd Street,
New York City.

APPENDIX A.

The Formal Standing and Extent of Actual Participation of Petitioner and Its Counsel in the Litigation Which Resulted in the Decree Claimed to Have Been Violated by the Respondent Companies.

1. Some time prior to May 12, 1937, United filed with the National Labor Relations Board certain charges, which resulted in the Board's making the formal complaint dated May 12, 1937, which was the first formal step in the litigation. (4 N. L. R. B. 71 *et seq.*)

2. The complaint of the Board was entitled "In the Matter of Consolidated Edison Company of New York, Inc., and its affiliated companies, etc., *and* United Electrical and Radio Workers of America, affiliated with Committee for Industrial Organization"; and this was the title under which all of the proceedings were had before the Board, and under which its formal decision and order were made. (4 N. L. R. B. 71. Transcript of Record in *Consolidated Edison Co.* v. *N. L. R. B. et al.*, pp. 133, 244, 404, 544, 696, 824, 967, 1104, 1194.)

3. United was represented by its own counsel at and participated in all of the hearings had before the National Labor Relations Board. (4 N. L. R. B. 71, 72. Transcript of Record in *Consolidated Edison Co.* v. *N. L. R. B. et al.*, pp. 133, 244, 404, 544, 696, 824, 967, 1104, 1194.)

4. The Board in its decision and findings specifically referred to Petitioner's character, and to the fact that the Board's complaint was *founded* upon Petitioner's charge (4 N. L. R. B. 71, 83); and in its order specifically provides for the protection of Petitioner (4 N. L. R. B. 108).

5. Before the taking of testimony before the Board, the Consolidated companies appeared specially and moved to dismiss the complaint. The special appearance and notice

of motion is also entitled in the manner stated above,—i. e., including the name of United as a party to the proceeding,—and is directed to the Regional Director of the Board *and* United.

6. On November 20, 1937, counsel for Petitioner were served by counsel for Consolidated Edison companies with a copy of the latter's petition for review, which had been filed in the Circuit Court of Appeals on November 18, 1937, and also with an order to show cause on an application for a stay pending the hearing of their petition by the Circuit Court of Appeals. *This was prior to the entry of the order on behalf of Petitioner in the Circuit Court of Appeals.*

7. The I. B. E. W.'s petition to the Circuit Court of Appeals for review of the Board's order, also admitted that the petitioner herein had been a party to the Board's proceedings. The petitioners stated, in their Petition, that they

> "respectfully pray this Honorable Court to review and set aside said Final Order entered and issued on November 10, 1937, by said National Labor Relations Board, in a proceeding entitled In the Matter of Consolidated Edison Company of New York, Inc., and its Affiliated Companies (hereinabove named) and United Electrical and Radio Workers of America, Affiliated with the Committee for Industrial Organization, and designated upon the Records of said Board as Case No. C-245."

8. On December 8, 1937, present counsel for Petitioner appeared in the Circuit Court of Appeals on the argument of the motion for a stay of proceedings, and argued the said motion on behalf of Petitioner. In the course of the argument Presiding Justice Manton suggested that a formal order of intervention be made, whereupon counsel for Petitioner filed an affidavit upon which a formal order, granting intervention, was entered on December 15, 1937. No limitations of any kind are contained in that order. Nor is there anything in the affidavit upon which the order was based suggesting any limitation, but counsel was careful to state

that the order should include not only what was to follow, but what had preceded, so as to enable him to file the brief on the motion for a stay of proceedings which had already been argued orally (Transcript of Record, pp. 1735, 1737). That the Circuit Court of Appeals did not intend to limit the right of counsel for Petitioner to the making of an argument and filing of a brief, but intended to accord Petitioner the full status of a party, is shown by the fact that in its final decision on the merits, rendered March 14, 1938, the court not only notes, in the preliminary statement, that United "intervened in support of the order," but also notes the appearance of

> "Louis B. Boudin of New York City for Intervener United Electrical and Radio Workers of America, C.I.O."

This is in striking contrast to what follows immediately, namely,—

> "James J. O'Brien, of Philadelphia, Pa., amicus curiae."
>
> 95 F. (2d) 392.

Clearly the court differentiated between one who merely files a brief and one who is a party to the litigation.

9. But this status of Petitioner as a party litigant had been recognized all along by the other parties to the litigation. We have already noted the formal steps of the Consolidated Edison companies prior to the entry of the formal order of intervention in the Circuit Court of Appeals. After the entry of that order, on January 7, 1938, counsel for the Consolidated Edison companies served their brief on the merits in the Circuit Court of Appeals. That brief is entitled in a manner to show Petitioner as a party, referring to it as "Intervening Respondent" in the title. And in the opening statement of the brief it is stated that—

> "The United Electrical and Radio Workers of America, affiliated with the Committee for Industrial

Organization, which filed a charge upon which the Board acted, has been admitted to the proceeding as an Intervenor."

10. Nor was the recognition of Petitioner as a party limited either to counsel for Consolidated Edison companies or to the proceedings in the Circuit Court of Appeals. On March 21, 1938, Consolidated Edison companies and I.B.E.W. each served on present counsel an order to show cause signed by Judge Manton on an application by the Consolidated Companies and I.B.E.W. for a stay of proceedings pending an appeal to the United States Supreme Court. These orders were captioned in a manner to show Petitioner as a party to the proceedings, and the body of the orders specifically directed that service of the order to show cause be made "on Louis B. Boudin, Esq., attorney for the intervenor."

11. On March 22, 1938, counsel for the Board served on counsel for Petitioner a copy of the Board's proposed decree on the decision of the Circuit Court of Appeals directing enforcement of its order.

12. Petitioner appeared in opposition to the motion for a stay pending appeal to the United States Supreme Court and filed an affidavit in opposition to that motion; and subsequently Consolidated companies served on present counsel for Petitioner reply affidavits in connection with that motion, captioned as already stated. On April 1, 1938, counsel for N.L.R.B. served on counsel for Petitioner a copy of the Board's affidavit in opposition to the motion for a stay. On April 6, 1938, the Clerk of the Circuit Court of Appeals notified counsel for Petitioner of the action of the court in granting the stay.

13. On April 14, 1938, Consolidated Edison companies and I.B.E.W. gave counsel for Petitioner formal notice of the fact that their respective petitions for certiorari had been filed with the United States Supreme Court, serving at the same time copies of their respective briefs in support of

the said petitions. Thereafter present counsel, appearing on behalf of Petitioner, filed a brief in opposition to the application for certiorari.

14. The Supreme Court of the United States, in granting certiorari to the Consolidated Edison companies and to the I.B.E.W. on May 16, 1938, recognized that the Petitioner herein was a party to the proceedings. The Court, through its Clerk, notified counsel for the Petitioner herein, as it did the Board and the other parties, that certiorari had been granted to the Consolidated Edison companies and to the I.B.E.W. And, significantly, the orders of the Court, granting certiorari, refer to the Petitioner herein as a party, for these orders (Nos. 916 and 957, October Term 1937) are respectively entitled "Consolidated Edison Company of New York, Inc., et al. v. National Labor Relations Board, et al." and "International Brotherhood of Electrical Workers, International Brotherhood of Electrical Workers, Local Union No. B-825, v. National Labor Relations Board, et al." Since, aside from the Board, the Petitioner herein was the only respondent in that case, the words "et al." which follow the words "National Labor Relations Board", refer to the Petitioner herein and signify that it was a party. (Official file, Nos. 42,397 and 42,438.)

15. After the grant by the United States Supreme Court of Application for certiorari, the parties through their counsel, on August 5, 1938, signed a stipulation consenting to the filing of a brief *amicus curiae* by Lee Pressman, Esq., on behalf of Committee for Industrial Organization, and by D. William Leider, Esq., on behalf of Utility Workers Organizing Committee. These stipulations were signed by Louis B. Boudin, Esq., as counsel for United.

16. Subsequently counsel for the respective parties exchanged briefs on the main question before the Supreme Court, serving their briefs on present counsel as counsel for Petitioner. The briefs were captioned in a manner to show not only that Petitioner was an "intervenor", but also that it was a "respondent".

17. At the argument before the United States Supreme Court Petitioner appeared by its own counsel, who argued the cause orally, in addition to filing his brief. The notation of his appearance in the official report of the case in the Supreme Court is as follows:

> "Mr. Louis B. Boudin, of New York City, argued the cause and filed a brief for respondent (intervener) United Electrical and Radio Workers of America:"

18. After rendering its decision, the Supreme Court issued its mandate to the Circuit Court of Appeals, which is entitled "Consolidated Edison Co. of New York, Inc., and Its Affiliated Companies, et al., vs. National Labor Relations Board, et al." and "International Brotherhood of Electrical Workers, International Brotherhood of Electrical Workers, Local Union No. B-825, et al., vs. National Labor Relations Board, et al."

Here, too, the words "et al." necessarily refer to the Petitioner herein, since aside from the National Labor Relations Board it was the only respondent in the enforcement proceedings.

APPENDIX B.

The Extent of Petitioner's Participation in the Litigation Which Terminated in the Decree Herein.

The foregoing recital of the formal steps in the litigation intended to show the *status* of Petitioner, also sufficiently indicate the extent of its participation,—which certainly did not differ in the slightest from that of the National Labor Relations Board, at least from the time that the matter came into the Circuit Court of Appeals. Its participation in the proceedings before the Board itself was only limited in one respect, in that the actual examination of witnesses was done by counsel for the National Labor Relations Board. That counsel for Petitioner were not mere spectators at the protracted hearings is evidenced by the fact that it appeared by

two counsel at each of the hearings. Nor was their function limited to mere consultation with counsel for the Board who were conducting the examination. On the contrary, the record shows that Mr. Louis B. Boudin at least participated in the most important arguments (see Transcript of Record, pp. 141, 150, 157). Indeed, it may be said without reflection on counsel for the Board, that he made the main arguments of the most important questions of law which arose in the course of the actual hearings,—which was apparently his function at these hearings.

The statement of counsel for Consolidated Edison in their brief that a trial examiner had ruled so as to exclude the participation of counsel for Petitioner in the hearings is clearly unwarranted. What actually happened at the point indicated in their brief was this:

Counsel for the Board had examined a witness, Foster Strader, called by the Board. After he was through with the re-direct, Mr. Cohn, one of the counsel for Petitioner, attempted to examine him further, whereupon the following colloquies occurred:

> "Mr. Ransom: I object to the question.
>
> Mr. Cohn: Wait until I finish the question.
>
> Mr. Ransom: I object to it. I object to any participation of anyone who is not a party to these proceedings, as far as I know there are only two counsel in this case who are entitled to be heard and one counsel on behalf of the government, who is the Regional Labor Board attorney, representing the complainant, the Regional Labor Board herein, and the other is counsel for these respondents appearing specially.
>
> Mr. Cohn: I submit that we are parties of interest here. Our appearances have been entered here and we are attorneys for the complainants who originally filed the charge and we would like to be heard.
>
> Judge Ransom: May I suggest that orderly procedure requires that this proceeding proceed in the usual way.
>
> Trial Examiner Gates: Normally examination will be conducted by one attorney, and I will sustain the objection."

Transcript of Record, pp. 338-339.

It will be observed that when counsel for Consolidated Edison raised an objection directed to the *standing* of Petitioner's counsel, his objection was immediately and conclusively disposed of by the answer of counsel for Petitioner. That counsel for Consolidated himself thought that he was wrong is evidenced by the fact that he did not press that objection but abandoned it, and substituted therefor a proper objection, namely, that normally at least one counsel is permitted to examine a witness unless the interests of the party who attempts to examine on his own behalf is different from that of the party whose counsel had already examined him, which was not the case here. *And it was that objection that the examiner sustained.* It is significant that no objection was raised by counsel for Consolidated when Mr. Boudin argued legal propositions, since counsel for various parties are normally allowed to argue legal questions even though they may be on the same side.

APPENDIX C.

No. 19

IN THE

Supreme Court of the United States

OCTOBER TERM—1938

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*
Petitioners

against

NATIONAL LABOR RELATIONS BOARD
Respondent

and

UNITED ELECTRICAL AND RADIO WORKERS OF AMERICA affiliated with the COMMITTEE FOR INDUSTRIAL ORGANIZATION
Intervenor-respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

WILLIAM L. RANSOM
WESLEY A. STURGES
P. M. BERKSON
Counsel for Petitioners

WHITMAN, RANSOM, COULSON & GOETZ
Solicitors for Petitioners
No. 40 Wall Street
New York City

APPENDIX D.

In The

Supreme Court of the United States

October Term, 1938.

No. 25.

International Brotherhood of Electrical Workers; International Brotherhood of Electrical Workers, Local Union No. B-825; International Brotherhood of Electrical Workers, Local Union No. B-839; International Brotherhood of Electrical Workers, Local Union No. B-832; International Brotherhood of Electrical Workers, Local Union No. B-826; International Brotherhood of Electrical Workers, Local Union No. B-828; International Brotherhood of Electrical Workers, Local Union No. B-829; and International Brotherhood of Electrical Workers, Local Union No. B-830, Affiliated with the American Federation of Labor, *Petitioners*,

against

National Labor Relations Board, *Respondent*,

and

United Electrical and Radio Workers of America, Affiliated with the Committee for Industrial Organization, *Intervenor-Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

REPLY BRIEF FOR PETITIONERS, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND ITS ABOVE-NAMED LOCAL UNIONS, TO BRIEF OF RESPONDENT, THE NATIONAL LABOR RELATIONS BOARD.

ISAAC LOBE STRAUS,
Munsey Building,
Baltimore, Maryland.

CLAUDE A. HOPE,
DELAFIELD, MARSH, PORTER & HOPE,
20 Exchange Place,
New York, N. Y.

Counsel for Petitioners.

FILE COPY

SEP. 9 1939
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1939.

No. 342.

AMALGAMATED UTILITY WORKERS, affiliated with Utility Workers Organizing Committee, Congress of Industrial Organizations,

Petitioner,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.,*

Respondents.

SUGGESTION OF A DIMINUTION OF THE RECORD AND PETITION FOR ORDER FOR ITS CORRECTION, AND SUPPORTING PAPERS.

ISAAC LOBE STRAUS,
DELAFIELD, MARSH, PORTER & HOPE, and
CLAUDE A. HOPE,
Attorneys for International Brotherhood of Electrical Workers, et al., Respondents,
No. 20 Exchange Place,
New York City.

ISAAC LOBE STRAUS,
CLAUDE A. HOPE,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 342.

In the Matter of the Application of

AMALGAMATED UTILITY WORKERS, affiliated with Utility Workers Organizing Committee, Congress of Industrial Organizations,

To Punish

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its Affiliated Companies, Brooklyn Edison Company, Inc., New York and Queens Electric Light and Power Company, Westchester Lighting Company, The Yonkers Electric Light and Power Company, New York Steam Corporation, and Consolidated Telegraph and Electrical Subway Company,

For Contempt.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its Affiliated Companies, et al.,

Petitioners,

—against—

NATIONAL LABOR RELATIONS BOARD, et al.,

Respondents.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. B-825, et al.,

Petitioners,

—against—

NATIONAL LABOR RELATIONS BOARD, et al.,

Respondents.

SUGGESTION OF A DIMINUTION OF THE RECORD.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERNATIONAL BROTHERHOOD

OF ELECTRICAL WORKERS, LOCAL UNION No. B-825; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. B-839; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. B-832; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. B-826; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. B-828; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. B-829; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. B-830, respectfully suggest to the Court that the printing of only the portions of the Record designated in a certain stipulation between the movant, Amalgamated Utility Workers, etc. and the respondents Consolidated Edison Company of New York, Inc. et al. and a failure to include in the printed Record petitioners' notice of motion which has been designated in the precipe served on behalf of your petitioners and filed in the office of the United States Circuit Court of Appeals for the Second Circuit on the 29th day of August, 1939, a certified copy of which precipe has been filed with the Clerk of this Court, would constitute a diminution of Record not authorized by the rules of this Court upon an application for writ of certiorari to review an order of a United States Circuit Court of Appeals.

Petitioners herein were made respondents in a proceeding brought by Amalgamated Utility Workers by petitioners' notice of motion to adjudge Consolidated Edison Company of New York, Inc. and its affiliated companies in contempt of court. Petitioners made a motion in said proceedings for an order dismissing the petition and notice of motion of Amalgamated Utility Workers on the ground, among others, that Amalgamated Utility Workers had no standing to institute and maintain the proceedings. The Cir-

cuit Court of Appeals denied the relief requested by Amalgamated Utility Workers, placing its denial upon such ground, and subsequently petitioners' motion and a similar motion made on behalf of respondents Consolidated Edison Company of New York, Inc. and its affiliated companies were denied.

Amalgamated Utility Workers being about to apply to this Court for a writ of certiorari to review the order denying its application to punish Consolidated Edison Company of New York, Inc. and its affiliated companies for contempt entered into a stipulation with Consolidated Edison Company of New York, Inc. and its affiliated companies with respect to the papers to be included in the Record, which stipulation provided in part "and the undersigned parties having agreed, by their respective solicitors, that the petitioner for certiorari need not for such purpose designate for inclusion the complete record and all the proceedings and papers herein". The papers specified in said stipulation failed to include the notice of motion filed by your petitioners for an order dismissing the petition of Amalgamated Utility Workers.

Although respondents in the proceedings, petitioners were not parties to the stipulation and were not requested to become parties. No precipe or other designation of the papers to be included in the Record were served upon petitioners by the applicant for the writ of certiorari.

Petitioners thereupon and on August 29th, 1939 served a precipe designating said notice of motion as a paper to be included in the Record herein and filed said precipe with the Clerk of the United States Circuit Court of Appeals for the Second Circuit. Copies of said notice of motion and said precipe were duly certified by said Clerk of the United States.

Circuit Court of Appeals for the Second Circuit and have been submitted to the Clerk of this Court as part of the transcript of record, with the request that they be printed as part of the record. As appears from the annexed affidavit of Claude A. Hope, the applicant for the writ of certiorari has refused to stipulate that the petitioners' notice of motion be included in the printed Record. Petitioners' counsel have been advised by the Clerk of this Court that "in order to add these papers to the Record it will be necessary that counsel stipulate that they be added or that there be submitted a suggestion of a diminution of the Record". Petitioners are causing a formal designation of their aforesaid notice of motion for inclusion in the Record under paragraph 9 of Rule XIII to be filed with the Clerk of this Court herewith and submit this suggestion in accordance with the letter of the Clerk of this Court advising that it be submitted.

Your petitioners verily believe that said notice of motion is a proper and necessary part of the Record and that it is of great importance to have it so included.

WHEREFORE, your petitioners respectfully pray that the Clerk of this Court be directed to print as part of the Record herein the notice of motion served by solicitors for your petitioners dated May 18, 1939 and for such other and further relief in the premises as to this Honorable Court may seem just and proper.

And your petitioners will ever pray, etc.

Dated, September 1, 1939.

ISAAC LOBE STRAUS and
CLAUDE A. HOPE.
Of Counsel for Petitioners.

Affidavit of Claude A. Hope.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 342.

[SAME TITLE.]

State of New York,
County of New York—ss.:

CLAUDE A. HOPE, being duly sworn, deposes and says:

I am an attorney and counsellor at law and one of the solicitors for the petitioners named in the annexed petition.

On or about August 28th, 1939 I learned that a stipulation had been entered into between Amalgamated Utility Workers, etc., applicant for a writ of certiorari herein, and Consolidated Edison Company of New York, Inc. and its affiliated companies to the effect that the entire Record need not be printed and designating for inclusion only certain papers therein specified. The specification of papers to be printed did not include the notice of motion filed on behalf of petitioners to dismiss the petition of Amalgamated Utility Workers in the United States Circuit Court of Appeals for the Second Circuit and dated May 18th, 1939. I immediately communicated with the solicitors for the applicant for the writ of certiorari and requested them to stipulate for the inclusion of said notice of motion in the Record. They refused to do so, stating that they did not recognize

the right of the petitioners named in the annexed petition to have said notice of motion included in the Record herein.

In sending a copy of their petition and brief for the writ of certiorari to me on August 29th, 1939 they stated in the letter with which it was transmitted that they did so as a matter of courtesy and also stated—"Please be advised that we do not recognize the International Brotherhood of Electrical Workers or any of its affiliated local unions as parties to the above mentioned proceeding."

I respectfully submit that unless the Clerk is directed to include said notice of motion in the Record, a certified copy of which is now on file with him, the Record will fail to comply with the provisions of Rules XIII and XXXVIII of the Rules of this Court to the end that the rights of said petitioners to participate in the subsequent proceedings herein may be lost or seriously impaired.

Wherefore, I respectfully request that the relief prayed for in the annexed petition be granted in all respects.

CLAUDE A. HOPE.

Sworn to before me this
1st day of September, 1939.

WILLIAM ADAMS,
Notary Public,
New York County.
N. Y. Co. Clk's No. 138, Reg. No. O A 73.
Kings Co. Clk's No. 68, Reg. No. 146.
Bronx Co. Clk's No. 9, Reg. No. 9-A-40.
Commission Expires March 30, 1940.

Letter of August 30, 1939.

August 30, 1939.

Hon. Charles Elmore Cropley,
Clerk of the Supreme Court,
Washington, D. C.

Re: Amalgamated Utility Workers
v. Consolidated Edison Company of New York, Inc.

Dear Sir:

Certain portions of the Record in the proceeding bearing the above caption were designated by stipulation between Amalgamated Utility Workers, etc. and Consolidated Edison Company of New York, Inc., and its Affiliated Companies in connection with an application by Amalgamated Utility Workers for a certiorari to review an order made by the Circuit Court of Appeals for the Second Circuit denying a motion to punish certain of the respondents for contempt. Although respondents in the proceeding, our clients, consisting of the International Brotherhood of Electrical Workers, Local Union No. B-825, and the other American Federation of Labor Unions were not parties to the stipulation. No precipe or other designation of the papers to be included in the Record was served upon us by the application for the writ of certiorari. The stipulation failed to designate a notice of motion which was filed by us on behalf of our aforesaid clients in the proceedings before the Circuit Court of Appeals.

The papers specified in the stipulation have been certified by the Clerk of the Court of Appeals for the Second Circuit and, we are advised, forwarded to you.

The notice of motion which we filed as aforesaid, was for an order dismissing the petition and motion of the petitioner on the ground, among others, that petitioner had no standing to institute and maintain the proceeding. The denial by the Circuit Court of Appeals of relief to the petitioner was placed upon this ground and consequently our motion and a similar motion made on behalf of respondents Consolidated Edison Company of New York, Inc., et al. were denied.

Having learned of the failure of petitioner to include our notice of motion in the papers forwarded to you and deeming it of the utmost importance to our clients, the respondents American Federation of Labor Unions, that the notice of motion be included in the Record, we prepared and served a precipe requesting its inclusion in the record. The precipe has been filed with the Clerk of the Circuit Court of Appeals for the Second Circuit.

We enclose herewith copy of the notice of motion filed on behalf of the respondents we represent, certified by the Clerk of the Circuit Court of Appeals for the Second Circuit, together with a certified copy of the precipe requesting the inclusion of this notice of motion in the Record. We respectfully request that the printed Record include this notice of motion and will very much appreciate your courtesy in arranging to have it so included.

Yours very truly,

ISAAC LOBE STRAUS,
DELAFIELD, MARSH, PORTER AND HOPE.

WBL:LLH
Enclosures

Notice of Motion to Dismiss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

[SAME TITLE.]

Sirs:

PLEASE TAKE NOTICE, that at a term of this Court to be held in the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 22nd day of May, 1939, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, the undersigned, in behalf of International Brotherhood of Electrical Workers; International Brotherhood of Electrical Workers, Local Union No. B-825, International Brotherhood of Electrical Workers, Local Union No. B-839; International Brotherhood of Electrical Workers, Local Union No. B-832; International Brotherhood of Electrical Workers, Local Union No. B-826; International Brotherhood of Electrical Workers, Local Union No. B-828; International Brotherhood of Electrical Workers, Local Union No. B-829; and International Brotherhood of Electrical Workers, Local Union No. B-830, the said International Brotherhood of Electrical Workers and each and all of its said Local Unions aforesaid being affiliates of the American Federation of Labor, will move, preliminarily to the hearing of the motion of the Amalgamated Utility Workers, that the petition and motion of Amalgamated Utility Workers, affiliated with the Utility

Workers Organizing Committee, Congress of Industrial Organizations, and all proceedings herein thereon, be DISMISSED, upon the grounds:

(1) That the Amalgamated Utility Workers has no standing, under the National Labor Relations Act or otherwise, to institute and maintain the proceeding and motion as set forth in the notice of motion and petition of the Amalgamated Utility Workers;

(2) That the motion papers fail to show whether the motion and the proceeding are prosecuted by the Amalgamated Utility Workers as in the nature of a civil contempt or a criminal contempt; that the facts alleged in the motion papers and accompanying affidavits do not state and support a charge of either a civil contempt or a criminal contempt, against the employers named; and that neither the motion nor the accompanying affidavits show or allege facts which would establish that any damages were suffered by the complaining labor organization, so as to support a finding of civil contempt;

(3) That the matters and things stated in the motion and accompanying affidavits are not of judicial cognizance upon the facts alleged and at this time;

(4) That the motion is in disregard of the Opinion of the Supreme Court of the United States on December 6, 1938, in the review proceedings in which the motion is entitled and brought, which Opinion interpreted the parts

of the Order of the National Labor Relations Board on which the said motion relies; and that the motion is in effect to secure an enlargement and modification of the Order of the National Labor Relations Board and the final Decree of this Court and by implication and inference to expand the scope and operation of the Order and Decree beyond the fair meaning of what was intended to be prohibited in the light of the issues, so as to make the Board's Order as modified apply to and determine and prohibit matters not litigated, determined and prohibited by such Order and Decree;

(5) That inasmuch as the Amalgamated's motion was brought without legal right, the "response" thereto and "suggestion" by counsel for the National Labor Relations Board are unauthorized and cannot operate to support or cause to be prosecuted a motion which the Amalgamated Utility Workers has no lawful authority to institute or maintain under the National Labor Relations Act; and

(6) That the facts stated in the said motion and accompanying affidavits are insufficient to show or constitute a violation of the modifying Decree entered by this Court on January 21, 1939, granting enforcement of the Order of the National Labor Relations Board entered November 10, 1937, as modified and interpreted by the Opinion of the Supreme Court of the United States on December 6, 1938;

and that the undersigned will, at the time and place above stated, move the Court for such other and

further relief as may be just and appropriate in the premises.

New York, May 18, 1939.

(Sgd) CLAUDE A. HOPE
ISAAC LOBE STRAUS
Of Counsel

ISAAC LOBE STRAUS,
DELAFIELD, MARSH, PORTER & HOPE and
CLAUDE A. HOPE,
Solicitors for International Brotherhood
of Electrical Workers, et al.,
20 Exchange Place,
New York, N. Y.

To:

WHITMAN, RANSOM, COULSON & GOETZ,
Solicitors for Consolidated Edison Company
of New York, Inc., et al.,
No. 40 Wall Street,
New York, N. Y.

BOUDIN, COHN & GLICKSTEIN, ESQS.,
Solicitors for Amalgamated Utility Workers,
No. 20 West 43rd Street,
New York, N. Y.

CHARLES FAHY, ESQ.,
General Counsel National Labor Relations
Board,
Shoreham Building,
Washington, D. C.

ALLAN PERL, ESQ.,
Acting Regional Attorney,
National Labor Relations Board,
No. 120 Wall Street,
New York, N. Y.

Motion denied on ground that the matters submitted in support thereof should properly be asserted in opposition to the Amalgamated Utility Workers' motion to punish for contempt.

June 2, 1939.

T. W. S.,
A. N. H.,
R. P. P.,
C. J. J.

Filed June 2, 1939, United States Circuit Court of Appeals, Second Circuit.

Praecipe.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

[SAME TITLE.]

Sirs:

PLEASE TAKE NOTICE that respondents International Brotherhood of Electrical Workers, International Brotherhood of Electrical Workers, Local Union No. B-825; International Brotherhood of Electrical Workers, Local Union No. B-839; International Brotherhood of Electrical Workers, Local Union No. B-832; International Brotherhood of Electrical Workers, Local Union No. B-826; International Brotherhood of Electrical Workers, Local Union No. B-828; International Brotherhood of Electrical Workers, Local

Union No. B-829; and International Brotherhood of Electrical Workers, Local Union No. B-830 designate the following portions of the record in this cause and request that they be incorporated into the transcript of record to be certified by the Clerk of this Court; and printed, on the application of Amalgamated Utility Workers to the Supreme Court of the United States for a writ of certiorari to review an order made by the United States Circuit Court of Appeals for the Second Circuit made on or about June 2, 1939, which denied the movant's motion for an order adjudging Consolidated Edison Company of New York, Inc., et al., in contempt of Court, etc., to wit:

Notice of motion served by solicitors for International Brotherhood of Electrical Workers, et al., dated May 18, 1939.

Dated, New York, N. Y., August 29, 1939.

Yours, etc.,

ISAAC LOBE STRAUS,
DELAFIELD, MARSH, PORTER & HOPE, and
CLAUDE A. HOPE,
Solicitors for International Brotherhood of Electrical Workers, et al.,
20 Exchange Place,
New York City.

To:
WILLIAM PARKIN, ESQ.,
Clerk of the United States Circuit Court of Appeals for the Second Circuit,
Federal Building,
Foley Square,
New York, N. Y.

BOUDIN, COHN & GLICKSTEIN, ESQS.,
Solicitors for Amalgamated Utility Workers,
20 West 43rd Street,
New York, N. Y.

WHITMAN, RANSOM, GOULSON & GOETZ, ESQS.,
Solicitors for Consolidated Edison Company of New York, Inc., et al.,
40 Wall Street,
New York City.

CHARLES FAHY, ESQ.,
General Counsel,
National Labor Relations Board,
Shoreham Building,
Washington, D. C.

ALLAN PERL, ESQ.,
Acting Regional Attorney,
National Labor Relations Board,
120 Wall St.,
New York City.

Clerk's Certificate.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 8 inclusive,* contain true and complete copies of originals thereof filed in said Court in the case of

CONSOLIDATED EDISON COMPANY OF NEW YORK, *et al.*,

—against—

NATIONAL LABOR RELATIONS BOARD, *et al.*,

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit this 30th day of August in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the said United States the one hundred and sixty-fourth.

(Seal)

D. E. ROBERTS,
Clerk.

---

* Reference to pages 1 to 8 is to the certified copies of the Notice of Motion and Praecipe filed in the office of the Clerk of the Supreme Court of the United States, which are printed herein at pages 9 to 15.

Letter of August 31, 1939.

OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
Washington, D. C.

August 31, 1939

Delafield, Marsh, Porter & Hope, Esqs.
New York City

Gentlemen:

I have your letter of the 30th instant enclosing certified copies of certain papers filed in the Circuit Court of Appeals in the case of Consolidated Edison Co. v. Nat'l Labor Relations Board, and requesting that these papers be added to the record in this Court in the case of *Amalgamated Utility Workers, etc.* v. *Consolidated Edison Co. of N. Y., Inc., et al.*, No. 342, October Term, 1939. In order to add these papers to the record it will be necessary that counsel stipulate that they be added or that there be submitted a suggestion of a diminution of the record.

I suggest that you immediately contact counsel for the petitioner in the case No. 342 in an effort to obtain a stipulation such as that just referred to, and upon receipt these papers will be printed and attached to the record.

Yours truly,

CHARLES ELMORE CROPLEY,
Clerk,

By H. B. WILLEY,
Assistant.

HBW:IM

Letter of September 1, 1939.

September 1, 1939.

Honorable Charles Elmore Cropley,
Clerk of the Supreme Court of
the United States,
Washington, D. C.

Re: Amalgamated Utility Workers v. *Consolidated Edison Company of New York, Inc., et al.*

Dear Sir:

Thank you for your letter of August 31st acknowledging receipt of the certified copy of notice of motion and precipe which we sent you on August 30th for inclusion in the printed Record.

We had already requested the attorneys for the applicant for the writ of certiorari, Amalgamated Utility Workers, to stipulate to include the notice of motion in question in the printed Record, and they had refused so to do.

In view of the fact that Rule XXXVIII, paragraph 1 requires a certified Transcript of Record to be filed with the petition for review on writ of certiorari, and that paragraph 9 of Rule XIII makes provision with respect to designation of parts of the Record to be printed, and that the stipulation as to the Record does not include our clients who are necessary parties thereto, we do not think it is necessary to apply for a certiorari to correct diminution of Record under Rule XVII.

However, in accordance with the advice contained in your letter, we have prepared a suggestion with respect to the diminution of Record, together with

an affidavit showing the refusal of the attorneys for the applicant for the writ of certiorari to stipulate to include the notice of motion in the Record, and file such suggestion with you herewith. We also, under the practice suggested by paragraph 9 of Rule XIII, file with you herewith a designation of additional parts of the Record to be printed.

We will appreciate your advising us whether these documents are sufficient to obtain the inclusion of the notice of motion in the printed Record.

Yours respectfully,

ISAAC LOBE STRAUS,
DELAFIELD, MARSH, PORTER & HOPE.

WBL:LLH
Enclosures

Designation.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1939.
No. 342.

[SAME TITLE.]

Come now the respondents International Brotherhood of Electrical Workers; International Brotherhood of Electrical Workers, Local Union No. B-825; International Brotherhood of Electrical Workers, Local Union No. B-839; International Brotherhood of Electrical Workers, Local Union No. B-832; Inter-

national Brotherhood of Electrical Workers, Local Union No. B-826; International Brotherhood of Electrical Workers, Local Union No. B-828; International Brotherhood of Electrical Workers, Local Union No. B-829; and International Brotherhood of Electrical Workers, Local Union No. B-830, in pursuance of paragraph 9 of Rule XIII of the Supreme Court of the United States, and for the purpose of enabling the Clerk to prepare the Record in this cause, hereby request the Clerk to incorporate the portion of the Record into the transcript of the Record herein which is hereinafter indicated, and additional to the Record designated in the stipulation between the appellant and certain of the other respondents, to wit,

Notice of motion served by solicitors for International Brotherhood of Electrical Workers, et al., dated May 18, 1939.

Dated, New York, N. Y., September 1, 1939.

Yours, etc.,

CLAUDE A. HOPE,
ISAAC LOBE STRAUS, DELAFIELD, MARSH, PORTER & HOPE, and
CLAUDE A. HOPE,
Solicitors for Respondents International Brotherhood of Electrical Workers, et al.,
20 Exchange Place,
New York City.

To:

HONORABLE CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court
of the United States,
Washington, D. C.

Notice of Motion to Dismiss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

[SAME TITLE.]

Sirs:

PLEASE TAKE NOTICE, that at a term of this Court to be held in the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 22nd day of May, 1939, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, the undersigned, in behalf of International Brotherhood of Electrical Workers; International Brotherhood of Electrical Workers, Local Union No. B-825, International Brotherhood of Electrical Workers, Local Union No. B-839; International Brotherhood of Electrical Workers, Local Union No. B-832; International Brotherhood of Electrical Workers, Local Union No. B-826; International Brotherhood of Electrical Workers, Local Union No. B-828; International Brotherhood of Electrical Workers, Local Union No. B-829; and International Brotherhood of Electrical Workers, Local Union No. B-830, the said International Brotherhood of Electrical Workers and each and all of its said Local Unions aforesaid being affiliates of the American Federation of Labor, will move, preliminarily to the hearing of the motion of the Amalgamated Utility Workers, that the petition and motion of Amalgamated Utility Workers, affiliated with the Utility

Workers Organizing Committee, Congress of Industrial Organizations, and all proceedings herein thereon, be DISMISSED, upon the grounds:

(1) That the Amalgamated Utility Workers has no standing, under the National Labor Relations Act or otherwise, to institute and maintain the proceeding and motion as set forth in the notice of motion and petition of the Amalgamated Utility Workers;

(2) That the motion papers fail to show whether the motion and the proceeding are prosecuted by the Amalgamated Utility Workers as in the nature of a civil contempt or a criminal contempt; that the facts alleged in the motion papers and accompanying affidavits do not state and support a charge of either a civil contempt or a criminal contempt, against the employers named; and that neither the motion nor the accompanying affidavits show or allege facts which would establish that any damages were suffered by the complaining labor organization, so as to support a finding of civil contempt;

(3) That the matters and things stated in the motion and accompanying affidavits are not of judicial cognizance upon the facts alleged and at this time;

(4) That the motion is in disregard of the Opinion of the Supreme Court of the United States on December 6, 1938, in the review proceedings in which the motion is entitled and brought, which Opinion interpreted the parts

of the Order of the National Labor Relations Board on which the said motion relies; and that the motion is in effect to secure an enlargement and modification of the Order of the National Labor Relations Board and the final Decree of this Court and by implication and inference to expand the scope and operation of the Order and Decree beyond the fair meaning of what was intended to be prohibited in the light of the issues, so as to make the Board's Order as modified apply to and determine and prohibit matters not litigated, determined and prohibited by such Order and Decree;

(5) That inasmuch as the Amalgamated's motion was brought without legal right, the "response" thereto and "suggestion" by counsel for the National Labor Relations Board are unauthorized and cannot operate to support or cause to be prosecuted a motion which the Amalgamated Utility Workers has no lawful authority to institute or maintain under the National Labor Relations Act; and

(6) That the facts stated in the said motion and accompanying affidavits are insufficient to show or constitute a violation of the modifying Decree entered by this Court on January 21, 1939, granting enforcement of the Order of the National Labor Relations Board entered November 10, 1937, as modified and interpreted by the Opinion of the Supreme Court of the United States on December 6, 1938;

and that the undersigned will, at the time and place above stated, move the Court for such other and

further relief as may be just and appropriate in the premises.

New York, May 18, 1939.

(Sgd) CLAUDE A. HOPE
ISAAC LOBE STRAUS
Of Counsel

ISAAC LOBE STRAUS,
DELAFIELD, MARSH, PORTER & HOPE and
CLAUDE A. HOPE,
Solicitors for International Brotherhood
of Electrical Workers, et al.,
20 Exchange Place,
New York, N. Y.

To:

WHITMAN, RANSOM, COULSON & GOETZ,
Solicitors for Consolidated Edison Company
of New York, Inc., et al.,
No. 40 Wall Street,
New York, N. Y.

BOUDIN, COHN & GLICKSTEIN, ESQS.,
Solicitors for Amalgamated Utility Workers,
No. 20 West 43rd Street,
New York, N. Y.

CHARLES FAHY, ESQ.,
General Counsel National Labor Relations
Board,
Shoreham Building,
Washington, D. C.

ALLAN PERL, ESQ.,
Acting Regional Attorney,
National Labor Relations Board,
No. 120 Wall Street,
New York, N. Y.

Supreme Court of the United States

OCTOBER TERM—1939

No. 342

AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS

Petitioner

vs.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its affiliated Companies, *et al.*

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

WILLIAM L. RANSOM
HORACE E. WHITESIDE
P. M. BERKSON
Counsel for respondents.

WHITMAN, RANSOM, COULSON & GOETZ
Solicitors for respondents
No. 40 Wall Street
New York City

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Supreme Court of the United States

OCTOBER TERM—1939

No. 342

AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS

Petitioner

vs.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its affiliated Companies, *et al.*

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Opinions below

The memorandum Opinion of the Court below (R. 13) has not yet been reported.

Jurisdiction

The Order of the Court below (R. 63) was entered on June 2, 1939. Petitioner Amalgamated Utility Workers (hereinafter referred to also as "Amalgamated" or "C I O") seeks to invoke the jurisdiction of this Court by virtue of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10(e) and (f)

of the National Labor Relations Act (hereinafter usually referred to as "the Act").

Petitioner's motion for an adjudication of civil contempt was made and entitled (R. 1) in the two review proceedings as to an Order of the National Labor Relations Board (hereinafter referred to as "the Board") dated November 10, 1937, instituted respectively by the respondent Companies and by the International Brotherhood of Electrical Workers affiliated with the American Federation of Labor (hereinafter referred to as "the Brotherhood") and seven of its Local Unions made up of employees of the respondents, under Section 10(f) of the Act, which were before this Court at the October Term of 1938 (305 U. S. 197). In the review proceedings, the Board had filed answers which asked for cross-relief by way of enforcement of its Order (95 Fed. [2nd] 390, 392).

Questions presented

Petitioner has stipulated (R. 2) its intention to bring up for review, and to rely upon, only the question as to whether or not it has standing to make and maintain the motion which was denied by the Court below; viz., a motion (R. 3) to adjudge the respondents in civil contempt of Court for alleged violations of the final decree entered upon the application of the Board by the Court below on January 21, 1939 (R. 8-9), which modified in certain respects according to the Mandate of this Court (305 U. S. 197), and granted enforcement of, an Order of the Board under Section 8 of the Act, as to "unfair labor practices."

Statute

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Sup. II, Title 29, Sec. 151 *et seq.*) are Section 9(a) and Section 10(a), (e) and (f), which are set forth in the Appendix hereto.

Statement

The final decree (R. 8-9) entered by the Court below upon the Board's application on January 21, 1939, in pursuance of the Mandate of this Court, struck from the Board's Order of November 10, 1937, the provisions of its Paragraph 1(f), which would have nullified the respondents' collective bargaining Contracts with the Brotherhood, the labor organization of which a large majority of the respondents' employees were undisputedly members at the time of the prior proceedings (305 U. S. 197, 232) and still are members (R. 28-29, 32-34, 58). Aside from the Contracts, the Board's Order as construed by this Court (305 U. S. at page 239) was granted enforcement, upon the Board's request (R. 8) under Section 10(e) of the Act.

The Board's Order had been made in a proceeding begun by a complaint served by the Board, solely under Section 8 of the Act, as to "unfair labor practices". The question of *representation* was stated by the Board not to be involved in that proceeding (Transcript in Docket No. 916,[1] pages 140, 279, 525-526). The complaint by the Board had originated in a "charge" filed by the C I O affiliate, predecessor of the present petitioner.

At the opening session before the Board's Trial Examiner, the Regional Attorney for the Board opposed successfully an application for intervention by two labor organizations which have since been merged into the Amalgamated. He stated the Board's view of law applicable to its procedure in such a case and of the status of labor organizations therein (Transcript in Docket No. 916, page 139):

> "The only parties to this proceeding, as I see it, are the Government and the Consolidated System. I think that it would be a mistake for the Board to establish precedent that in any proceeding where the public interest is being litigated, any group or any attorney should be permitted to come in as repre-

[1] For convenience, the record in the two review cases at the October Term of 1938 will be cited herein as "Transcript in Docket No. 916".

> senting individual employees or groups of employees who find themselves within the same protective hand as that of those who filed the original charge. There is nothing inconsistent in that statement because the Board, as proceeding here, gives the same protection to the employees represented by Mr. Redfield and Mr. Fink as they do to the employees represented by the labor organization that filed the charge here."

The proofs in support of the complaint were presented solely by counsel for the Board, and an attempted participation by counsel for the C I O was excluded by the Trial Examiner (Transcript in Docket No. 916, pages 338-339).

In their petition for certiorari (page 4), counsel for the Amalgamated represent that, upon their application, "this petitioner thereupon became a formal party" to the review proceedings instituted in the Circuit Court of Appeals by the Companies and by the Brotherhood—the review proceedings in which the present motion was made and entitled (R. 1). The facts are that upon the hearing of those petitions for review, counsel for the C I O asked that Court that "I be permitted to argue and file a brief on its behalf, both on the motion for a stay, as well as on the final argument of this case on the merits." The Court granted this limited application by a notation endorsed "Motion Granted" (Transcript in Docket No. 916, page 1735). Because counsel for the C I O had filed a brief and argued in the Circuit Court of Appeals in support of the Board's request for the enforcement of its Order, his claim of right to do the same things in this Court was not contested. Only in that sense and to that limited extent, was the Amalgamated (or a predecessor) "a formal party" at any stage of the proceeding. In its brief in opposition to the petition of the Brotherhood for certiorari in Docket No. 916—1938 Term, the Board stated to this Court (page 10), as to proceedings under Section 8 of the Act:

> "The Act requires complaints to be served upon employers, who alone are subject to Orders of the Board:

it does not permit the Board to make labor organizations parties to its proceedings."

The Brotherhood did not ask to be made a party, and did not take part, before the Board. As persons or a body "aggrieved" by the Board's Order, the Brotherhood instituted a review proceeding (R. 1), under Section 10(f) of the Act, argued the same before the Circuit Court of Appeals, and petitioned for and obtained certiorari for review by this Court. The present motion of the Amalgamated in the Court below was made in *both* review proceedings (R. 1). The Amalgamated gave the Brotherhood notice thereof (R. 4). The Brotherhood appeared in the Court below and contested the standing of the Amalgamated to make and maintain such a motion.

The Amalgamated's motion, the denial of which it seeks to review, was in form and effect a motion for an adjudication of civil contempt, in furtherance of *enforcement* of claimed "special rights of the petitioner" under the Act and the Board's Order as modified. Specifically, the motion asked (1) That the respondent Companies, etc., be adjudged in contempt of the decree of the Circuit Court of Appeals "for having failed to comply with its decree dated March 21st, 1938, as amended by its decree dated January 21, 1939"; and (2) That the Court take action "to make effective the Order of the National Labor Relations Board, as ordered to be enforced by this Court".

Amalgamated's petition in this Court states (page 12) that its petition for an adjudication of contempt "was filed for the protection of its own rights as well as those of its members". Its contention is that an examination of the "specific provisions" of the Act "clearly indicates an intention to confer *private rights* upon individuals as well as groups or associations" (Petition, page 17). Concerning the Board, the petitioner's contention is stated to be that the Board "has no *duties* of any kind to perform under

the Act. It is an *industrial court of first instance*, pure and simple" (Petition, page 21).

The respondent Companies answered the motion fully on the merits (R. 14-25), and showed affirmatively (R. 22-23) that about 65 per cent of their eligible employees are members of the Brotherhood with dues fully paid (R. 28-29, 32-34, 58), establishing the majority representation of the employees under Section 9(a) of the Act, and that the Companies have complied with Section 9(a) of the Act and with the decision of this Court as to the Contracts in force with the majority labor organization. Further defenses were stated (R. 23-24), including a challenge of the standing of the Amalgamated to institute such a proceeding as to a Board Order (R. 23). The Companies also filed affidavits (R. 26-62) which, with the documents attached as "exhibits", showed in detail the Companies' compliance with the decree of January 21, 1939, and the Board's Order as so modified.

In denying the motion, the Court's memorandum opinion (R. 13) stated only

> "that moving party has no standing to press a charge of civil contempt, if contempt had been committed. Under the National Labor Relations Act the Board is the proper party to apply to the Court for an Order of enforcement and to present to the Court charges that the Court's Order has not been obeyed."

As the petitioner stipulated (R. 2) that it raised, and would rely on, only the question of its standing to institute such a contempt proceeding, the detailed affidavits supporting both the answer (R. 14-25) and Mr. Carlisle's answering affidavit (R. 26-62) were not offered by the petitioner for printing in the record here. Mr. Carlisle's affidavit and the "exhibits" attached thereto (R. 40-62) are deemed to show fully the Companies' compliance with the decree of January 21, 1939, with the Board's Order as modified, and with the Act.

ARGUMENT

The question presented by the petition is one of procedure for the enforcement of claimed private rights, and does not appear to be substantial or doubtful. The decision below was in accord with the rulings of other Circuits as to the nature of the rights and enforcement procedures created by the Act.

Petitioner claims (pages 5, 7, 26) that it and its members are "aggrieved" by alleged non-compliance with the enforcement decree, and that the Act necessarily gives enforcement rights to organizations and persons who would be aided and benefited by enforcement. The premise is that the Act confers private rights upon the Amalgamated and its members, and places in their hands the procedural remedy of resort to the Court in first instance. The argument is, in substance, that inasmuch as the Act declares and confirms the right of labor organizations to bargain collectively in behalf of employees, it must necessarily be construed to provide by implication for private proceedings in Court (by an interested labor organization) to enforce and make effective whatever advantages would accrue to the labor organization or its members from the Board's decisions under the Act. Faced with the fact that the enforcement procedures stated in the Act are those available only to the Board and that a person or organization "aggrieved" is given only the right to petition for a *review* of a Board Order but no right to petition to enforce an Order, the Amalgamated argues that the statutory plan of enforcement on petition of the Board should be construed to leave the way open for a labor organization to enforce by a civil contempt its private rights under the Act and the Board's findings. Inasmuch as the parallel language of the Federal Trade Commission Act leaves no right of a person aggrieved to institute a civil contempt,

the Amalgamated argues that the practice under the Act "should be assimilated to the practice under the Interstate Commerce Act" (Petition, page 13), in disregard of the fact that the latter statute specifically provides private administrative and judicial remedies for the protection of the private rights which it confers upon shippers.

Petitioner's contentions fly in the face of both the legislative purpose stated in the enactment of the Act and the grounds on which its constitutionality has been upheld by this Court as to employers carrying on their business solely or predominantly within one State. The Act was not passed or upheld on any theory that it could validly place under Federal jurisdiction the enforcement of *private* rights against intrastate concerns. The public interest and right as to interstate commerce unobstructed from any cause or source were declared to be paramount; and it is only when and where labor controversies may lead to strife which in turn may obstruct that commerce, that the Board may act to protect that commerce (*Consolidated Edison Company* v. *National Labor Relations Board*, 305 U. S. 197, 220-221; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601). The private interests of employers, labor organizations and employees, as to labor practices which might obstruct commerce, have been wholly subordinated to the public interest; and the Board's responsibility for initiating such steps as it deems to be necessary and proper to effectuate the policy of the Act is for the protection of the *public*, rather than primarily or directly the individual employee or labor organization, from the inconvenience and losses caused by the disruption of commerce by industrial strife.

All this was clearly stated in the Report of the House Committee on Labor (No. 972; 74th Congress), accompanying the Wagner bill (page 21):

> "The Board is empowered, according to the procedure provided in Section 10, to prevent any person from engaging in any unfair labor practice listed in

> Section 8 'affecting commerce', as that term is defined in Section 2(7). This power is vested exclusively in the Board and is not to be affected by any other means of adjustment or prevention. The Board is thus made the paramount agency for dealing with the unfair labor practices described in the bill.
>
> "The procedure provided is analogous to that in the Federal Trade Commission Act (Sec. 5) and is familiar to all students of administrative law. * * *
>
> "* * * No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint. The form of injunctive and affirmative order is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by law declared to be detrimental to the public weal."

The above-stated concept was put in the law, in virtually the language of the first paragraph quoted. Section 10(a) of the Act, which is headed "Prevention of Unfair Labor Practices" and contains in subsequent paragraphs (b) to (i), inclusive, all of the provisions for their prevention and for the enforcement of the Board's "cease and desist" Orders, is as follows:

> "SEC. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practices (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

The powers of the Board to prevent "unfair labor practices" affecting commerce as defined are thus made "exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established", in any manner. The subsequent enforcement provisions of

Section 10 in terms enure only to the Board. Could language and its intent be broader, in negativing the exclusion of enforcement proceedings initiated by anyone else?

There has been no lack of uniformity in the decisions, in the various Circuits, as to nature of the rights and procedures created by the Act and as to claims of right of private persons or labor organizations to take the initiative in Court to enforce benefits they would gain under the Act. The ruling in the Second Circuit is not solitary or at variance. The Fifth, Sixth, and Ninth Circuits, have held the procedure provided by the Act is not and cannot be "made a private one to enforce a private right. It is a public procedure, looking only to public ends."

Agwilines, Inc. v. *National Labor Relations Board*, 87 Fed. (2nd) 146, 150 (C. C. A. 5th);
National Labor Relations Board v. *Arthur J. Colten and A. J. Colman*, 105 Fed. (2nd) 179 (C. C. A. 6th);
National Labor Relations Board v. *Hearst*, 102 Fed. (2nd) 658, 664 (C. C. A. 9th);
National Labor Relations Board v. *Carlisle Lumber Company*, 99 Fed. (2nd) 533, 537 (C. C. A. 9th).

The declaration by the Congress is decisive also against the petitioner's contention that the Act intended to assimilate the procedure under it to that provided expressly in the Interstate Commerce Act, and that therefore a labor organization should be given the same right to go to Court as a shipper has under express provisions of the Interstate Commerce Act, as to the enforcement of private rights. The Report accompanying the Wagner bill stated that "the procedure provided [in the Act] is analogous to that in the Federal Trade Commission Act (Section 5)."

Apart from such a declaration of legislative intent, the procedure provided in the Wagner Act will be found, on examination, to be closely analogous to that provided in the Federal Trade Commission Act. In its concepts and pro-

cedure, the Wagner Act was plainly adapted from the Federal Trade Commission Act. The concept of "unfair trade practices" was carried into the field of "unfair labor practices", and the procedure under the Federal Trade Commission Act appropriately went with it. Under neither Act may a private person file or prosecute a complaint before the Commission or Board. A labor union may file a "charge" (Section 10(b)), but it is for the Board to say whether or not a complaint and proceeding shall follow. Under both Acts formal complaint is by and in the name of the Commission or Board; the prosecution is by the Government, which bears the entire expense of it; both Acts were drawn to give the Board or Commission, at every stage of the hearing or enforcement, the discretion as to what shall be done, subject merely to the right of "aggrieved" persons to review and contest any Order. With respect to Section 5 of the latter, this Court said (*Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 25):

> "* * * Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it."

The Interstate Commerce Act, on the other hand, creates a private administrative and judicial remedy; e. g., any interested person deeming himself aggrieved may file and prosecute a complaint *as of right*, at his own expense, and the carrier is required to answer, all as in civil judicial

proceedings. *Federal Trade Commission* v. *Klesner, supra.* An individual shipper is given the right to reparation, and procedure is expressly provided for a suit by the shipper in Court to enforce an Order of reparation (Section 9). The National Labor Relations Act contains no such features, but makes the Board the final arbiter as to when a complaint should be prosecuted and as to when an Order of the Board should be enforced, by contempt proceedings or otherwise.[1] Only when a labor organization is *aggrieved* by an Order of the Board has it any standing in Court as a petitioner, and then the standing is solely as a person *aggrieved by the Order* and for the sole purpose of reviewing the Order and asking that it be set aside or changed (Section 10(f) of the Act). If the Congress had intended to confer upon private individuals the right to institute proceedings in Court for any purpose other than review when aggrieved, it would have made express provision therefor, as it did in the following Acts:

Fair Labor Standards Act of 1938, 52 Stat. 1060, Sec. 16(a);

Interstate Commerce Act, 36 Stat. 1167, Sec. 9;

United States Shipping Board Act, 39 Stat. 728, 736, Sec. 22;

Packers and Stockyards Act, 42 Stat. 159, 165, Secs. 308, 309.

---

[1] Where the Board has found, upon investigation, that contempt proceedings should be instituted because of non-compliance with decrees enforcing its Orders, the Board has instituted such proceedings.

See:

National Labor Relations Board v. *Bell Oil and Gas Company*, 98 Fed. (2nd) 405; rehearing denied 99 Fed. (2nd) 56 [C. C. A. 5th]; motion to punish for contempt denied.

National Labor Relations Board v. *Hopwood Retinning Company*, 104 Fed. (2nd) 302, 303 [C. C. A. 2nd]; motion to punish for contempt granted. Opinion shows that the Board's motion was supported by "affidavits * * * from officials and attorneys of the Board's Second Region located in New York, from officials of the Unions involved, and from twelve production employees, drivers, and helpers", which indicates that the Board conducted an investigation as to violations of its Order *before* it went to Court with a contempt proceeding.

National Labor Relations Board v. *Eavenson and Levering Company*, reported in L. R. R. August 28, 1939, page 973 [C. C. A. 3rd]; motion to punish for contempt denied.

But even under the Interstate Commerce Act, this Court has held that a shipper has standing in Court only when an independent right of his own is violated and not when the interest or advantage claimed to be violated is an incident of and is dependent on a right of others, under the Act (*Sprunt and Son* v. *United States*, 281 U. S. 249). Here the Act gives to the Board the right to ask enforcement of its Order, and the Board exercised that right, by its petition for enforcement. The civil contempt proceeding is merely a continuance of the earlier proceeding (*National Labor Relations Board* v. *Hopwood Retinning Company*, 104 Fed. (2nd) 302, 305), and was so treated and entitled by the Amalgamated (R. 1). The Amalgamated has no independent right or standing to initiate any manner of enforcement steps in the very proceedings in which the Board exercised its statutory right of petitioning for enforcement.

In the light of these considerations, the conclusion is inescapable that the Amalgamated has no standing to press a charge of civil contempt. Furthermore, the Amalgamated does not show or seek monetary damages, or assert any specific injury to itself or its members beyond the denial of its claim to the aid of administrative and judicial processes in its conflict with the majority Union. Absent any damages which can be admeasured, there could be no basis for maintaining a civil contempt (*Judelshon* v. *Black*, 64 Fed. (2nd) 116, 117):

> "* * * The theory of recovery in civil contempt proceedings is to compel the payment of damages by way of a fine, and, since no damages were suffered, there should be no finding of contempt."

Punishment for civil contempt of judicial process is an enforcement procedure which should be used sparingly and with great caution and deliberation (*Fox* v. *Capital Company*, 96 Fed. (2nd) 684). Where, as here, the paramount public interest is to be protected and vindicated, the initiative in all enforcement should consistently be that of the public agency, not of a contending labor organization.

"The function of guarding the public against acts deemed illegal rests with the public officials" (Brandeis, J., in *Ashwander* v. *Valley Authority*, 297 U. S. 288, 343). Investigation and ascertainment of the facts by the responsible public agency should *precede* resort to the Court with a charge of contempt.[1]

Conclusion

The decision and Order below were correct, as plainly in accord with the wording and the declared intent of the Act and with the sound functioning of the procedures set up in the field of labor relations. In view of the uniformity of the decisions in the Circuits as to the nature of the rights and procedures provided by the Act, we urge that no occasion exists for a review of this procedural question.

Respectfully submitted

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[1] This would be in appropriate accord with the procedure stated by General Counsel for the Board to be that regularly followed as to complaints by labor organizations. In an address at Duke University on December 3, 1938 (3 L. R. R. M. 1044), Mr. Fahy outlined the course followed:

> "The Regional Director on receipt of the charge dockets it. He may investigate the matter personally or he may assign it to a field examiner. The stories of the Union and the employees are obtained. The story of the employer is obtained. A complete investigation is made, including the facts as to jurisdiction. This preliminary investigation both as to jurisdiction and the alleged unlawful practices, precedes any formal proceedings.
>
> "The Director has simply received a charge which he is investigating. During this stage 42 per cent of all our cases are dismissed or withdrawn either as a result of the Regional Office finding that the charge is so lacking in merit as not to warrant further proceedings, or because jurisdiction is believed to be lacking. The charge is either dismissed or, on the advice of the Regional Director to the charging party that he will proceed no further, is withdrawn. If, however, the investigation leads the Regional Director to believe that the charge is well founded, he seeks compliance."

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat., 449, U. S. C., Sup. II, Title 29, Sec. 151 *et seq.*) are as follows:

Section 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

Section 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise. * * *

(e) The Board shall have power to petition any Circuit Court of Appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the Circuit Courts of Appeals to which application may be made are in vacation, any District Court of the United States (including the Supreme Court of the District of Columbia), within any Circuit or District, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such Order and for appropriate temporary relief or restraining Order, and shall certify and file in the Court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such Order was entered and the findings and Order of the Board. Upon such filing, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined

therein, and shall have power to grant such temporary relief or restraining Order as it deems just and proper and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the Order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the Court for leave to adduce additional evidence and shall show to the satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the Court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original Order. The jurisdiction of the Court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate Circuit Court of Appeals if application was made to the District Court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, Secs. 346 and 347).

(f) Any person aggrieved by a final Order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any Circuit Court of Appeals of the United States in the Circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing

in such Court a written petition praying that the Order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the Court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the Order complained of was entered and the findings and Order of the Board. Upon such filing, the Court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining Order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the Order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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SEP 26 1939
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 342.

AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS, *Petitioner*,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and ITS AFFILIATED COMPANIES, ET AL., *Respondents*.

In the Matter of the Application of
AMALGAMATED UTILITY WORKERS, ETC.,
To Punish
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and ITS AFFILIATED COMPANIES, ET AL.,
For Contempt.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and ITS AFFILIATED COMPANIES, ET AL., *Petitioners*,

—against—

NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents*.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-825, ET AL., *Petitioners*,

—against—

NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-825, ET AL., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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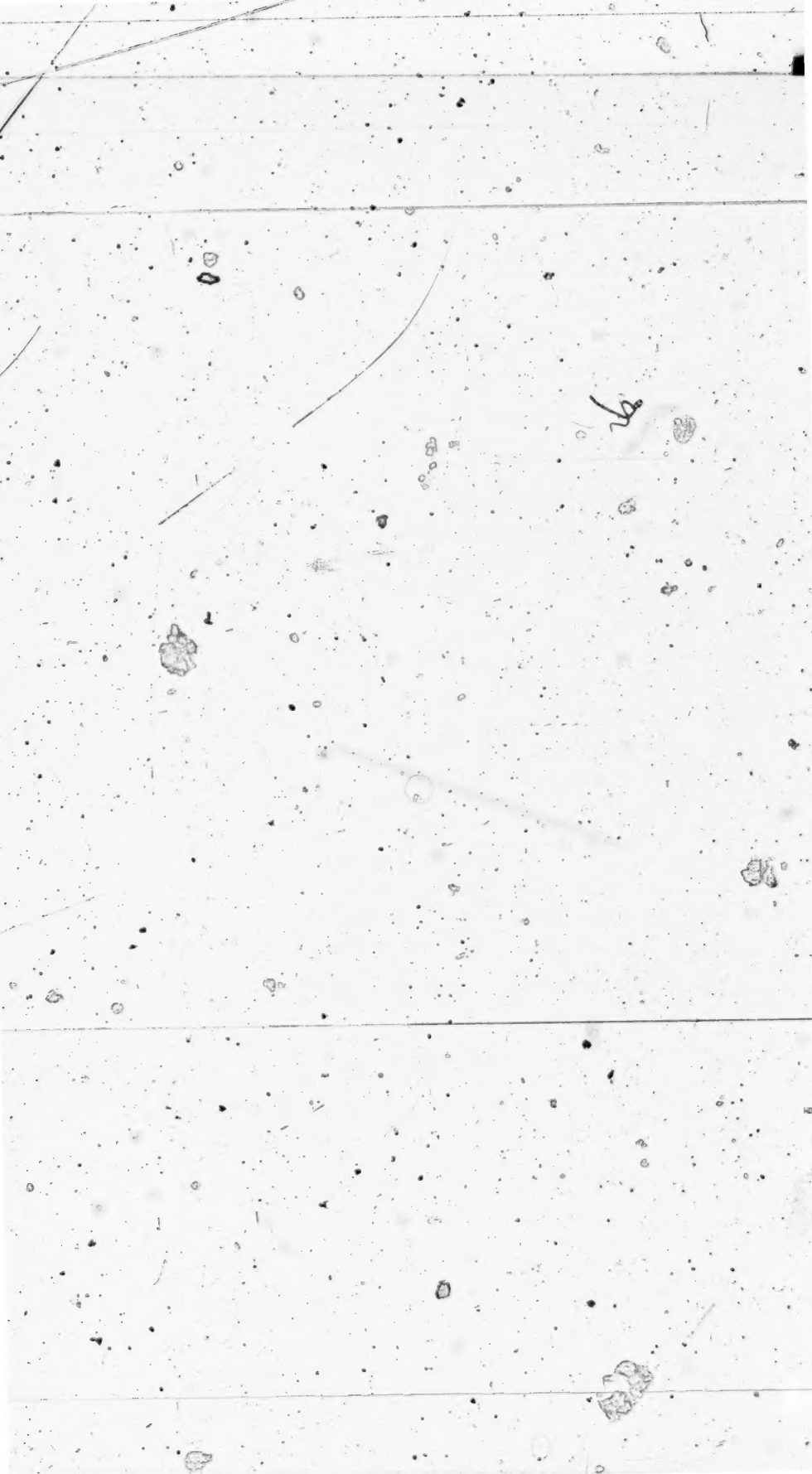

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OPINIONS BELOW.

The Memorandum Opinion of the Court below (R. 13) has not yet been reported.

JURISDICTION.

The Order of the Court below (R. 63) was entered on June 2, 1939. Petitioner (hereinafter sometimes referred to as the "Amalgamated") seeks to invoke the jurisdiction of this Court by virtue of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10(e) of the National Labor Relations Act (hereinafter usually referred to as "the Act").

Petitioner's Motion for an adjudication of contempt against the Respondent Companies, and for additional comprehensive and general relief "as the nature of the case may require", was made and entitled (R. 1) in the review proceedings instituted, respectively, by the Respondent Companies and by these Respondents, the International Brotherhood of Electrical Workers and seven of its Local Unions, made up of employees of the Respondent Companies, under Section 10(f) of the Act, which were before this Court at the October Term of 1938 and decided on December 5, 1938. (305 U. S. 197).

The Matter came before the Court below upon the Petitioner's Notice of Motion and Petition (R. 4-13) with accompanying affidavits, the Motion of the Brotherhood and its said Local Unions for an Order dismissing the said Notice of Motion and Petition of the Amalgamated (which Motion of the Brotherhood has been omitted from the Record by virtue of a Stipulation between Petitioner and the Respondent Companies to which the Brotherhood was not, and was not requested to become, a party*), a Motion of the Respondent Companies, similar

* For the purpose of correcting the omission of these Respondents' said Notice of Motion from the printed Record filed by the Petitioner herein, these Respondents have filed in this cause a Suggestion of a Diminution of the Record and a Petition for an Order for its Correction, and Supporting Papers. See Discussion *infra* at pp. 4-5.

to that of these Respondents, to dismiss the said Notice of Motion and Petition of the Amalgamated, the verified Answer of the Respondent Companies (R. 14-25), and the answering Affidavit of Floyd J. Carlisle with Exhibits A to H, both inclusive (R. 26-62), showing the Respondent Companies' compliance with the Decree of January 21, 1939.

QUESTION PRESENTED.

Petitioner has stipulated (R. 2) its intention to bring up for review, and to rely upon, *only* the question as to whether or not it has standing to make and maintain the Motion, denied by the Court below, to adjudge the Respondent Companies in contempt of Court for alleged violations of the final decree, entered upon the application of the National Labor Relations Board (hereinafter referred to as "the Board"), by the Court below on January 21, 1939 (R. 8-9), which modified in certain respects according to the Mandate of this Court (305 U. S. 197), and granted enforcement of, an Order of the Board, dated November 10, 1937, under Section 8 (1) and (3) of the Act.

STATUTE.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Sup. II, Title 29, Sec. 151 *et seq.*) are Section 5, Section 6, Section 9, Section 10(a), (b), (c), (d), (e) and (f), and Section 11(1), (2), (3), (4), (5) and (6).

STATEMENT.

The statement of the Matter involved, in the Petition for Certiorari, is not, it is respectfully submitted, accurate. Therefore, these Respondents respectfully submit a statement of the case.

These Respondents desire, respectfully, also to direct this Court's attention, at this point, to their Suggestion of a Diminution of the Record and to their Petition for an Order for its correction, and supporting papers, which these Respondents have heretofore filed in this cause. As alleged in said Suggestion and Petition (pp. 3-4), a Stipulation (R. 1), to which neither these Respondents nor their counsel were parties, or requested to become parties, was entered into on August 24, 1939, between counsel for Petitioner and counsel for the Respondent Companies, and filed in the cause below, in which it was agreed between those parties, among other things, "that the Petitioner for Certiorari need not for such purpose designate for inclusion the complete record and all the proceedings and papers herein". It is further alleged in said Suggestion and Petition that the papers specified in said Stipulation failed to include the Notice of Motion to Dismiss filed by these Respondents, and, moreover, that no *praecipe* or other designation of the papers to be included were served upon these Respondents by the Petitioner; and it is further shown therein (p. 4), with an affidavit (pp. 5-6) of counsel for these Respondents in support thereof, and in correspondence (p. 18) between said counsel and the Clerk of this Court filed therewith, that counsel for the Petitioner refused, upon request by counsel for these Respondents, after the latter learned of the execution and contents of said

Stipulation, to agree that the said Notice of Motion filed by these Respondents be included in the printed Record, and that said counsel for Petitioner had further stated that they did not recognize these Respondents as parties to the cause.*.

Because of their extremely important personal and property rights directly involved in and integrally connected with this cause and the matters and questions raised in and by Petitioner's Motion and Petition which the Court below denied, and in view of the clearly unwarranted reason of Petitioner's counsel for refusing to consent to the inclusion in the Record of these Respondents' said Notice of Motion, namely, that they did not recognize these Respondents as parties to the cause, all of which is in contravention of explicit findings and conclusions of this Court in this cause, involving the same parties and subject-matters and the same Order of the Board, it is respectfully submitted that the Order prayed by these Respondents for the correction of the Record should be granted.

The cause in the Court below in which the Petitioner's Motion for the adjudication of contempt was filed, as will be seen by reference to its title (R. 1), was the original proceeding by these Respondents and the Respondent Companies, under Section 10(f) of the Act,

* Paragraph III of said Stipulation provides: "That upon the hearing of any application by Amalgamated Utility Workers, etc., for such a writ of certiorari, and upon any hearing of the case by and before the Supreme Court of the United States if certiorari be granted, the respondents Consolidated Edison Company of New York, Inc., et al., may submit to the Court, and refer to, any other notices of motion or any other affidavits submitted with the motion, the petition, or the answer, and which were filed with the Circuit Court of Appeals for the Second Circuit by either side; and that *any other party to the proceeding* may likewise submit to the Court and refer to any other notices or affidavits which were filed with this Court upon such motion."

to review and set aside the Board's Order of November 10, 1937. The Court below, in said cause, denied relief both to these Respondents and the Respondent Companies (95 F. (2) 390) and directed the enforcement of the Board's Order. On Certiorari to the Court below to review said decision, this Court, on December 5, 1938 (305 U. S. 197), directed that the decree in the cause be modified so as to hold unenforceable the provision of Paragraph 1(f) of the Board's said Order, and the application to that provision of Paragraph 2(c) of said Order.* Thereafter, and in accordance with the Mandate of this Court, the Court below, on January 21, 1939, by its final Decree in the cause (R. 8-9), duly modified its said original Decree as this Court had directed.

These Respondents, together with the Respondent Companies, were made Respondents in the said proceeding for the adjudication of contempt. The Petitioner's Notice of Motion (R. 3) was addressed by Petitioner to counsel for these Respondents (R. 4) as well as to counsel for the Respondent Companies, and to the General Counsel for the Board in Washington, D. C., and its acting Regional Attorney in New York City. Thereafter, Motions to Dismiss Petitioner's said Motion and Petition, on behalf of these Respondents and the Respondent Companies, as well as the verified Answer of the Respondent Companies, with supporting affidavits, referred to above, were filed in the cause. The Motions to Dis-

* Paragraphs 1(f) and 2(c) of the Board's Order (R. 6-7) had required the Respondent Companies to cease and desist from giving effect to their contracts with these Respondents, and to post notice to the employees of said Respondent Companies stating, among other things, that they would cease and desist in the manner aforesaid and that they would not discharge or in any manner discriminate against any employee for refusal or failure to join these Respondents or any other labor organization.

miss were argued, and supporting Briefs submitted to the Circuit Court of Appeals, by Counsel for both groups of Respondents who, respectively, filed said Motions

The Petitioner's Motion (R. 4-13) alleges, in detail, the proceedings in the cause from the time of their inception before the Board, which was by the filing of the original charge of unfair labor practices against the Respondent Companies by the present Petitioner's predecessor, and which proceedings resulted in the Board's Order of November 10, 1937. The relief sought against the Respondent Companies, and their respective officers, directors and agents, was that they be adjudged in contempt of the Court below for having failed to comply with its Decree of March 21, 1938, as amended by its Decree of January 21, 1939, and there is then added a separate, general and comprehensive prayer, not directed at any specified person or persons, that "thereafter this Court take such action as shall appear just, reasonable and necessary to make effective the Order of the Board" as ordered to be enforced by the Court below.

It is to be noted that Petitioner did not file its Motion and Petition as a person aggrieved under Section 10(f) of the Act, nor is there any citation or mention in said Motion and Petition of any provision of the Act, or of the Board's Rules and Regulations, or of any Statute whatsoever, under which jurisdiction was alleged or intimated to exist.

Without reviewing in detail the many allegations of Petitioner's Motion upon which the relief it prays is based, we deem it sufficient for the purposes of this statement, merely to point out *the pervading averments*

therein showing these Respondents' serious interest in and integral connection with the subject matter involved, and showing also the utter lack of right or standing of Petitioner to make or maintain its said Motion and Petition. All of the allegations dealing with the proceedings generally before the Board, including the filing of the charge and the complaint, the several hearings, the Board's findings of fact and conclusions of law, and its Final Order destroying, as it did, these Respondents' contracts and personal rights, were and are, of course, as this Court has already adjudicated, of important and serious interest to these Respondents.*

The Amalgamated's Motion and Petition charge that the Respondent Companies have wilfully, deliberately and maliciously failed and refused to obey the Orders of the Court below, and are continuing to refuse to obey them, in that they have violated and are continuing to violate specified sections of the Board's Order, namely, by permitting organizers and collectors of these Respondents, which are referred to as I. B. E. W., to engage in union activities, while refusing similar privileges to organizers and collectors of Petitioner; (paragraph 11) by urging, persuading, warning and coercing employees into joining I. B. E. W. and threatening them with discharge if they failed to join I. B. E. W., and have gone so far in their interference with the self-organization of their employees as to require certain employees to become organizers and

*It is stated in paragraph 4, erroneously, as the Record in the cause in this Court in the October Term, 1938, shows, that "The I. B. E. W. and certain locals thereof applied for permission to *intervene*, which permission was granted." These Respondents, in that case, petitioned the Court below, under Section 10(f) of the Act, as persons "aggrieved," to review and set aside the Board's Order of November 10, 1937.

shop stewards of I. B. E. W.; (paragraph 12) by urging, persuading, warning, and coercing their employees into paying dues to I. B. E. W., and into signing check-off agreements of I. B. E. W., collecting dues for I. B. E. W. through supervisory employees, and otherwise giving assistance to I. B. E. W.; (paragraph 13) by permitting their employees, supervisory and otherwise, to be active in behalf of I. B. E. W., such activities having included the distribution of I. B. E. W. membership and application cards and buttons, the collection of I. B. E. W. dues, the solicitation of membership in I. B. E. W., the signing of check-off agreements of I. B. E. W., and that said practices of I. B. E. W. are flagrantly carried on during working hours and upon company property; (paragraph 15) by permitting their employees who constitute grievance committees of I. B. E. W. to meet with the Company for the purpose of discussing grievances, supervisory officials having openly admitted that their orders from the Companies were to meet only with I. B. E. W. grievance committees; (paragraph 16) by recognizing and bargaining exclusively with I. B. E. W. as the collective bargaining agent of the employees; and (paragraph 17), by negotiating and bargaining collectively with I. B. E. W. and discriminating and extending privileges in favor of I. B. E. W., while refusing to extend like privileges to the Petitioner.

The Motion* of these Respondents to Dismiss Petitioners' Petition or Motion was duly and fully presented to, argued before, and acted and decided upon by the Court below, together with the several and respective,

* For text of these Respondents' Notice of Motion to Dismiss, duly certified, the Court is respectfully referred to pages 9 to 13 of these Respondents' Suggestion of a Dimunition of the Record and Petition for Order for its Correction, and supporting papers, already filed in this cause.

Motions of the Respondent Companies, the accompanying affidavits, and the verified Answer of the Respondent Companies.

The grounds asserted and assigned by these Respondents in support of their said Motion to dismiss the Amalgamated's Petition were, among others, (1) that the Petitioner had no standing, under the Act or otherwise, to institute and maintain the proceeding as said Petitioner, under its Notice of Motion and Petition, was attempting to do; (2) that the attempted proceeding of Petitioner was in disregard of the Opinion and Mandate of this Court, in the review proceedings in which the Motion was entitled and brought, which Opinion interpreted the parts of the Board's Order on which the said Motion relied; and that the Motion was in effect to secure an enlargement and modification of the Board's said Order and the final decree of the Court below, so as to make the Board's Order as modified apply to and determine and prohibit matters not litigated, determined and prohibited by such Order and Decree; and (3) that the facts stated in Petitioner's said Petition or Motion and accompanying affidavits were insufficient to show or constitute a violation of the modified Decree, entered by the Court below on January 21, 1939, granting enforcement of the Board's Order of November 10, 1937, as modified and interpreted by the Opinion of this Court of December 5, 1938.

The Respondent Companies, in both their Motion to Dismiss the Petition of the Amalgamated and their Answer to it on the merits (R. 23), asserted, among other substantial grounds, that the Petitioner had no standing, under the Act or otherwise, to institute and maintain the proceeding. The Respondent

Companies clearly establish in their said Answer (R. 14, 22-23) that approximately 65 per cent of their eligible employees are fully paid-up members of these Respondents. They further establish, in their said Answer and in the supporting affidavits (R. 26-62), compliance with Section 9(a) of the Act and with the Opinion and Mandate of this Court.

The Court below denied Petitioner's Motion and Petition, filing only a Memorandum Opinion of which the full text is (R. 13):

> "Motion denied on ground that moving party has *no standing* to press a charge of civil contempt, if contempt has been committed. *Under the National Labor Relations Act the Board is the proper party to apply to the court for an order of enforcement and to present to the court charges that the court's order has not been obeyed.*"

The action of the Court below on these Respondents' Motion to Dismiss, and also on the Respondent Companies' Motion to Dismiss, rendered without opinion, were Decrees* reading:

> "Motion denied on ground that the matters submitted in support thereof should properly be asserted in opposition to the Amalgamated Utility Workers' motion to punish for contempt."

However, it perfectly appears that the action of the Court below in dismissing the Amalgamated's Motion and Petition was explicitly and literally predicated upon the specific ground principally urged in the Motions to Dismiss filed by both the Respondent Brotherhood and Local Unions and the Respondent Companies that the

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* Appears at page 13 of these Respondents' Suggestion of a Diminution of the Record, etc.

moving party had no standing to press a charge of civil contempt, if contempt has been committed, and that Under the National Labor Relations Act the Board is the proper party to apply to the Court for an Order of enforcement and to present to the Court charges that the Court's Order has not been obeyed.

ARGUMENT.

I.

The Petitioner Had No Right or Standing, Under the National Labor Relations Act, or Otherwise, to Institute and Maintain Its Proceeding Herein for the Order It Prayed to Punish for Contempt, Because Under the Act the Board Alone Is the Proper Party to Apply to the Court for an Order of Enforcement and to Present to the Court Charges That the Court's Order Has Not Been Obeyed.

The Court below held that the "moving party has no standing to press a charge of civil contempt, if contempt had been committed. *Under the National Labor Relations Act the Board is the proper party to apply to the Court for an order of enforcement and to present to the Court charges that the Court's order has not been obeyed*".

The soundness and correctness of the Decision of the Court below upon this point does not, it is respectfully submitted, admit of any reasonable doubt. The effect of the Act itself is so plain as to exclude any substantial question as to the propriety of the Court's Decision.

Petitioner had no lawful standing or authority under the Act, or otherwise, to institute and maintain its proceeding and Motion in the Court below for contempt. It is respectfully submitted that only the Board is au-

thorized by the Act to enter Orders under and within the scope of the Act, to petition the Circuit Courts of Appeals, or, in the alternative, the other Federal Courts designated by the Act, to enforce its Orders, and, for the protection of those for whom the Act authorizes the Board to enter its Orders and to apply to the Courts for their enforcement, to take action to have the Courts punish for contempt those who violate the decrees of the Courts enforcing the Board's Orders. That such is the effect and intent of the Act is apparent throughout its context and particularly in Section 5; Section 6; Section 9; Section 10(a), (b), (c), (d), (e) and (f) and Section 11(1), (2), (3), (4), (5) and (6).

If private parties, whether individuals or labor organizations, irrespective and independent of action by the Board, could institute proceedings to punish for contempt for violations, including continued violations, of the Board's Orders and of the decrees, enforcing such Orders, then any such parties could renew and continue the litigation of the questions involved in the proceedings upon which the Board and the Courts had passed, without end. And instead of the Board, upon its responsibility under the Act, being the official Actor in the proceedings to protect its Orders and effectuate the Act, any employee or group of employees could usurp and assume that exclusive function and duty of the Board. The purposes of the Act, and the authority and duty of the Board thereunder to pass the orders provided for by the Act for the protection of those whom the Board is constituted to protect, make and establish the Board as the sole functionary or agency appointed and directed to afford such protection, and to effectuate such protection by securing the enforcement of its Orders by the decrees

of the Courts upon its, the Board's, application to that end, and *a fortiori*, if the decrees of the Courts so passed be disobeyed or violated by the persons who are directed to obey them, it is the exclusive function and duty of the Board to ask the Courts to enforce their decrees by supplemental decrees, or by proceedings for contempt, or in such manner as may be appropriate to the particular occasion. If parties other than the Board had the right to anticipate and forestall the function of the Board to apply to the Court for enforcement and effectuation of the Board's Orders, and for enforcing and effectuating the Courts' decrees passed specifically to enforce the Board's Orders, then the powers and duties of both the Board and the Courts, *as definitely ascertained and marked out by the Act*, would be subject to invasion and usurpation by unofficial parties, and the effectuation of the Act and of the powers and duties of the Board would be thrown into endless and inextricable confusion. In brief, the Act has exactly, throughout its several provisions, established, created and commanded the Board to protect the rights of those whom the Board and its powers were ordained to protect, and it is for the Board exclusively to exercise those functions in the public interest, without power upon the part of the Board to abdicate them, and without the right upon the part of anyone else, individual or organization, to invade or usurp them.

If employees are injured, in violation or derogation of the Act, by the failure of any employer to obey and carry out a decree of a Court enforcing an Order of the Board, the plain, appropriate remedy of such employees is to *apply to the Board* to take steps to relieve them of their injury by applying to the Court to enforce its own decree whether by contempt proceedings or other appro-

priate mandate or remedy. The Board may pass and enter an Order, but, even if it be violated, may never ask for its enforcement, and the individual or union, upon whose complaint the Board acted by instituting the proceeding, has not the slightest right to require the Board to apply to the Court for the enforcement of its Order.

Meyers v. Bethlehem etc. Co., 303 U. S. 41; 48; 51.
Newport News etc. Co. v. Schauffler, 303 U. S. 54; 57.
N. L. R. B. v. Jones and Laughlin etc. Corp., 301 U. S. 1; 46; 47.
Petition of N. L. R. B., 304 U. S. 486.

The similar and corresponding language of the Federal Trade Commission Act does not give any right to a person aggrieved by any violation of that Act to a proceeding or remedy to enforce that Act by proceedings for contempt or in any other manner. In this respect the National Labor Relations Act was explicitly analogized to the Federal Trade Commission Act in the Report of the Committee of the House of Representatives submitted to the House with the formulated Bill, which became the National Labor Relations Act, and the Committee's recommendation of its passage. In that Report, No. 972 of the 74th Congress, the Committee said:

> "The Board is empowered, according to the procedure provided in Section 10, to prevent any person from engaging in any unfair labor practice listed in Section 8 'affecting commerce', as that term is defined in Section 2(7). *This power is vested exclusively in the Board and is not to be affected by any other means of adjustment or prevention.* The *Board* is thus made the paramount agency for deal-

ing with the unfair labor practices described in the bill.

"The procedure provided is analogous to that in the Federal Trade Commission Act (Sec. 5) and is familiar to all students of administrative law. * *

"* * *No private right of action is contemplated.* Essentially the unfair labor practices listed are matters of *public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint.* The form of injunctive and affirmative order is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by law declared to be detrimental to the public weal."

The above specific declaration of the House Committee, condensed but undiminished in substance, is expressed in Section 10(a) of the Act itself:

"Sec. 10(a). The *Board* is empowered, as hereinafter provided, to prevent *any* person from engaging in any unfair labor practices (listed in section 8) affecting commerce. *This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.*"

The power provided by the Act to relieve against and prevent unfair labor practices is thus not only vested in the Board, but is made unmistakably "exclusive", and not only "exclusive" but so utterly and absolutely "exclusive" that it is additionally declared by the Act that it the said power, "shall *not be affected* by any other means of adjustment or prevention that has been or may be established by *agreement, code, law, or otherwise*".

Nor does the Act leave the matter, as an absolutely exclusive power in the Board alone, to rest even upon those provisions, comprehensive, conclusive and secure as they obviously are. It expressly, consistently and decisively vests *all power of enforcement in the Board alone, confines* the *power there* and *excludes and precludes its existence anywhere at all outside of the Board.* All the enforcement powers of Section 10, in terms too plain to admit of any doubt, concur specifically and invariably to that effect and that end.

Besides, as is now fully settled and understood, the policy and purpose of the Act were to maintain an unburdened, unobstructed and uninjured interstate commerce, by preventing the burden, obstruction and injury which strife and interruptions growing out of labor controversies impose and inflict upon that commerce, which the Board is constituted and empowered, as the responsible and exclusive public agency, to protect. The paramount policy and purpose of the Act was so expounded and declared by this Court in *National Labor Relations Board v. Jones & Laughlin Steel Corporation,* 301 U. S. 1, 37-41; *Consolidated Edison Company of New York, Inc., and International Brotherhood of Electrical Workers v. National Labor Relations Board,* 305 U. S. 197, 220-221; *National Labor Relations Board v. Fainblatt,* 306 U. S. 601.

In *Federal Trade Commission v. Klesner,* 280 U. S. 19, this Court, speaking of Section 5 of the Federal Trade Commission Act, with which the Report of the Congressional Committee substantially identified the procedure prescribed in the Wagner Act, said (p. 25):

> "* * * Section 5 of the Federal Trade Commission Act does not provide private persons with an

administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it."

It is clear under the Federal Trade Commission Act, and equally clear under the National Labor Relations Act, that a private person, corporation or other entity may not file or maintain any complaint which may be prosecuted before the Commission under the former Act, or before the Board under the latter. Under both Acts, if there is to be any prosecution of any charge or complaint or proceeding against any alleged offender, it must be by and in the name of the Commission or the Board, representing and acting as and for the Government, which alone initiates, maintains, conducts and defrays the expense of the proceeding, in every instance, exclusively and alone.

Moreover, the Decision of the Court below concurs and is entirely uniform with decisions of other Circuit Courts of Appeals in their denial of any standing on the part of an employee or a union of employees to maintain proceedings in Court for the enforcement of orders of the Board. The holding in other Circuits is that the procedure provided by the Act is not and cannot be "made

a private one to enforce a private right. It is a public procedure looking only to public ends."

Agwilines, Inc., v. National Labor Relations Board, 87 F. (2) 146, 150 (C. C. A. 5).

National Labor Relations Board v. Colton, 105 F. (2) 179 (C. C. A. 6).

National Labor Relations Board v. Hearst, 102 F. (2) 658, 664 (C. C. A. 9).

National Labor Relations Board v. Carlisle Lumber Company, 99 F. (2) 533, 537 (C. C. A. 9).

An employee or a union of employees may file a charge with the Board under the Act, Section 10(b), but, upon their own part, may not proceed beyond that. The Board alone may and must decide whether or not it will make or issue a complaint upon the charge and whether or not any proceeding thereon shall ensue. If the Board decides that there shall be such complaint and proceeding it retains exclusive and complete control over every following stage of the hearing, decision and the proceeding, if any, to enforce its decision. Even after rendering a decision and order the Board may decide, in its own discretion, to rescind or modify it, or not to ask for its enforcement in either its original or modified form, and no one, employee or union of employees, or employer, or any other governmental authority, may control, or impose any restriction or requirement upon, the Board's discretion to apply or not to apply to the Court for an enforcement of its order at any stage or in any respect. The only qualification to the power and discretion, above stated, of the Board is the right of "any person *aggrieved*" to petition the Courts designated in Section 10 of the Act to review and either set aside or modify an Order of the Board.

It is thus plainly manifest that no person or association or union of employees have any standing in Court respecting an Order of the Board in any particular, unless they are *"aggrieved"* by the Order and that such standing, as a person aggrieved by the Order, is strictly limited and confined to a proceeding by petition to the Court to review the Order and set it aside or modify it. All the sub-paragraphs of Section 10, and particularly Section 10(f), are, beyond misunderstanding, to that effect.

Not only the sub-paragraphs of Section 10, but as mentioned hereinabove, Section 5, Section 6, Section 9, and Section 11 (1), (2), (3), (4), (5) and (6) of the Act, have the same unmistakable intendment. Section 5 and Section 6 vest in the Board, solely, full and complete discretionary authority to "prosecute any inquiry necessary to its functions" and to "make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this Act." Section 9, dealing with and providing for "Representatives and Elections," after stating, in sub-paragraph (a), that representatives designated or selected for the purposes of collective bargaining by the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in such unit for such purposes, and affording employees the right to present grievances to their employer, proceeds, in sub-section (b), to clothe the Board with the right to decide in each case the unit appropriate for such purposes, and, in sub-section (c), to investigate and certify the name or names that have been designated or selected, and sub-section *(d) provides for the inclusion in the transcript, in review cases*

under Section 10(f), of the certification and the record of an investigation under Section 9.

Under "Prevention of Unfair Labor Practices," Section 10(a) expressly makes the power of the Board, in its function designated in the caption to the Section, absolutely exclusive; sub-section (b), as stated above, vests the right in employees to file a charge with the Board under the Act, but affords employees no further rights in any respect, and, under sub-sections (c) and (d), the authority of the Board in the prevention of unfair labor practices is provided for, to be exercised, as stated in sub-section (a), namely, exclusively.

Section 11 vests the Board with "Investigatory Powers" for the purpose of *all hearings and investigations*, which, in the opinion of the Board, are *necessary and proper for the exercise of the powers vested in it by Section 9 and Section 10.* By sub-section (1) the Board is given the right of access to any relevant evidence of any person being investigated or proceeded against, and to issue subpoenas and administer oaths; by sub-section (2), in cases of contumacy or refusal to obey such subpoenas, designated Courts, upon application by the Board, are given jurisdiction to enforce the Board's powers; sub-section (3) contains provisions relating to self-crimination in giving evidence in obedience to the subpoena of the Board; sub-section (4) provides methods for the service of the Board's processes and provides that fees and mileage of witnesses summoned before the Board shall be the same as those in the Courts of the United States; sub-section (5) contains provisions for the service of process of any Court to which application may be made under the Act; and by sub-section (6) the Board, upon its request, may, when the President so directs, obtain all records,

papers and information from the several departments and agencies of the Government relating to any matter before the Board.

II.

Petitioner's Motion, Which the Court Below Denied, Contravenes the Opinion and Judgment of This Court in the Review Proceedings in Which It Is Entitled and Brought, Which Opinion Interpreted the Parts of the Order of the Board on Which the Motion Mainly Relies; the Motion Being in Effect to Secure an Enlargement and Modification of the Order of the Board and the Final Decree of the Court Below and to Expand the Scope and Operation of the Order and Decree, so as to Make the Board's Order as Modified Apply to and Determine and Prohibit Matters Not Litigated, Determined and Prohibited by the Order and Decree.

The Motion of the Petitioner is in derogation of the Opinion and Judgment of this Court, rendered December 5, 1938, in the review proceedings in which the Motion herein is entitled and brought. In its Opinion, this Court construed and limited the particular parts of the Order of the Board upon which the Motion herein for contempt relies. The Opinion of this Court discloses that the Motion herein is in effect to secure a modification and enlargement of the Order of the Board in excess and beyond the limitations which this Court expressly put upon the Board's Order. Such an expansion of the scope and operation of the Order of the Board and the Decree of the Court below, pursuant to the Opinion and Mandate of this Court in directing the modification of the Board's Order, would be directly in contravention of the Opinion and Mandate of this Court and, in effect, undo and

nullify a material and vital part of that Opinion and Mandate.

With reference to this subject, the substance of the complaint of the Amalgamated, set forth in detail throughout its Petition, is of things alleged to have been done by the Companies, and things which the members of the Brotherhood Unions, these Respondents, are alleged to have done with the sanction of the Companies. *The essence and burden of the Motion and complaint are that the Companies have continued to bargain collectively and deal with these Respondents, the Brotherhood and its Locals, in recognition and pursuance of the contracts, between the Companies and these Respondents, which this Honorable Court saved from abrogation and upheld as valid and operative, instead of bargaining and dealing with the Amalgamated.*

The Amalgamated's Motion and Petition, and its complaint therein, are founded and asserted upon Paragraph 1(f), *formerly 1(g)*, of the Board's Order of November 10, 1937, which provides that the Companies shall "cease and desist" from "Recognizing the International Brotherhood of Electrical Workers as the exclusive representative of their employees".

This Court will recall that, with reference to said Paragraph 1(g) of the Order, it declared in its Decision of December 5, 1938, of the cases presented by the Petition of the Companies and the Petition of the Brotherhood and its Locals:

> "Subdivision (g) of that paragraph, requiring the companies to cease recognizing the Brotherhood 'as the exclusive representative of their employees', stands on a different footing. The contracts do not claim for the Brotherhood exclusive representation

of the companies' employees but only representation of those who are its members, and the continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of 'representation' should arise. Section 9. *We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act. So construed, that subdivision merely applies existing law.*"

With reference to the making of these contracts, this Honorable Court in its Opinion rendered by Mr. Chief Justice HUGHES, page 232 of 305 U.S., said:

"It also appears from the evidence, which was received without objection, that the Brotherhood and its locals comprised over 30,000 or 80 per cent of the companies' employees out of 38,000 eligible for membership."

And at pages 236-237, the Court further said:

"The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under Section 7 the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The 80 per cent. of the employees who were members of the Brotherhood and its locals, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. * * * The Board by its order did not direct an election to ascertain who should represent the employees for collective bar-

gaining. Section 9 (c). Upon this record there is nothing to show that the employees' selection as indicated by the Brotherhood contracts has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute. * * * Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce. They contain no terms which can be said to 'affect commerce' in the sense of the Act so as to justify their abrogation by the Board. The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period."

And, further, upon page 238, the Court said:

"The Brotherhood was entitled to form its locals and their organization was not assailed. The Brotherhood and its locals were entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. To say that of the 30,000 who did join there were not those who joined voluntarily or that the Brotherhood did not have members whom it could properly represent in making these contracts would be to indulge an extravagant and unwarranted assumption."

And after concluding "that the Board was without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order", the Court expressed its judgment and determination, above recited, respecting subdivision (g), now (f), of Paragraph 1 of the Order.

As of March, 1939, a careful and exhaustive verification by the Respondent Companies and also by these Respondents, the Brotherhood and Local Unions, of the membership and dues records indicated 65% of the employees of the Companies as members of the Brotherhood and its Locals with dues fully paid. This is shown in elaborate detail in the Affidavit of Mr. Floyd L. Carlisle and reference to the Affidavit of Dr. J. J. Wittmer, in the printed Record herein. These Affidavits fully support Paragraphs VIII and IX of the Respondent Companies' Answer (R. 19-21), and also Paragraphs XIV, XV and XVI of their Answer (R. 22-23).

For the exhaustive details upon this subject, the attention of this Court is respectfully directed to the Affidavit of Mr. Carlisle (R. 28-29) as to Membership of Employees in Labor Organizations; and (R. 28-30) as to The Collective Bargaining Contracts in Force Between the I. B. E. W. and the Companies; and particularly (R. 32-36) upon Recent Checking and Verification of the Extent of I. B. E. W. Membership Among the Companies; and see the Report of Dr. Wittmer, included in Mr. Carlisle's Affidavit (R. 32-34) and Dr. Wittmer's conclusion (R. 34).

See also Exhibit "F": I. B. E. W. Membership Among Employees of the Companies, Determined from Review of Membership Records During March, 1939 (R. 58).

It thus clearly appears that in making and continuing the contracts of these Respondents, the Brotherhood and its Local Unions, with the Companies, 65% of the employees have selected and continued the Brotherhood and its Locals as their representative for the purposes of collective bargaining. Accordingly, it would seem to be too obvious for argument that the essential object of the Amalgamated's Petition and Motion was to avoid the conditions and proceedings sanctioned by this Honorable Court in its Opinion and Judgment in the cases in question and, in effect, to nullify or evade the clear determinations of this Court therein.

Moreover, the Opinion of His Honor, Mr. Chief Justice HUGHES, for the Court, in the cases referred to, refers repeatedly to Section 9(a) of the National Labor Relations Act in connection with the subjects embraced in the above-recited excerpts from the Opinion. That Section, 9(a), provides:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

In the *Jones and Laughlin case* (301 U. S. 1, 44), this Court held that the obligation to deal with the true representative imposes the negative duty to treat with no other. The Circuit Court of Appeals has held that there is no duty to bargain if the representatives are

not the proper representatives of the majority in an appropriate unit. *Mooresville Cotton Mills v. National Labor Relations Board* (C. C. A., 4th), 94 Fed. (2nd) 61, affirmed on rehearing 97 Fed. (2nd) 959.

Under the rulings of the Board, the Companies were under no duty to bargain or deal also with a minority labor organization. The Board held in the case of *Mooresville Cotton Mills* and *Local 1221, United Textile Workers of America*, 2 N. L. R. B. 1081, that it was not an unfair labor practice for an employer to refuse to discuss grievances with employees' representatives who do not represent a majority of an appropriate unit. See, also, *Matter of Williams Manufacturing Company, Portsmouth, Ohio*, 6 N. L. R. B. 30, where the Board dismissed the charge of violation of Section 8(5) of the Act because of the failure to show majority representation at the time requests to bargain were made. See, also, *Matter of M. Lowenstein & Sons, Inc.*, 6 N. L. R. B. 37, and *Matter of Titan Metal Manufacturing Company*, 5 N. R. L. B. 81.

III.

The Facts Stated in Petitioners' Motion and Accompanying Affidavits Were Insufficient to Show or Constitute a Violation of the Modifying Decree Entered by the Court Below on January 21, 1939, Granting Enforcement of the Order of the Board Entered November 10, 1937, as Modified and Interpreted by the Opinion and Judgment of This Court on December 5, 1938.

The facts stated in the Motion and Petition and accompanying Affidavits are insufficient to show a violation of the modifying Decree entered by the Court below on January 21, 1939, pursuant to the Mandate of this Court,

granting enforcement of the Order of the Board of November 10, 1937, as modified and interpreted by this Court.

The affidavits filed by the Amalgamated with its Motion and Petition and the Respondent Companies' Answer and supporting affidavits plainly show that Amalgamated, a small minority Union, which submits no evidence and makes no showing of its membership, is seeking to supplant a large majority Union, consisting of a verified 65 per cent. of the employees in dealing and contracting with the Companies, their contracts being both fair and directly conducive to the public interests and welfare and to the effectuation of the paramount policy and purpose of the National Labor Relations Act. The Amalgamated does not embrace even the 35 per cent. of the employees outside of the Brotherhood and its Local Unions, because the 35 per cent. is divided between members of the Amalgamated and members of no union at all (R. 28-29).

The detailed and exhaustive Answer of the Respondent Companies to the Amalgamated's Motion and Petition (R. 14-25), wholly refutes and overcomes the claims of the Motion and Petition. Paragraph II of the Answer denies each and every allegation of Paragraphs 10 to 19, inclusive, of the Motion and Petition that the Companies or any of them have been guilty of any violation of the modifying Order entered by the Court below on January 21, 1939, or of the Order of the Board as modified and interpreted by this Court; and alleges that the Companies, ever since said Order of January 21, 1939, have complied, and intend to comply, in good faith, with said Order so modified. The Answer then makes specific denial of the allegations of Paragraphs 10, 11, 12, 13 and 14

of the Motion and Petition (Answer, Paragraphs III, IV, V, VI and VII, R. 15-19). Paragraph VII of the Answer, denying the allegations in Paragraph 15 of the Motion, alleges compliance upon the part of the Companies in good faith with Section 9(a) of the Act, refers to its contracts with the I. B. E. W. and its Locals "containing a substantial majority of its eligible employees"; shows that such I. B. E. W. majority has recently been ascertained by a detailed count and check; and the validity of the contracts and their continuance in force adjudicated and upheld by this Court in the review proceedings in which the pending Motion is entitled and instituted; and, substantial provisions of the contracts and their wholesome effect are set forth (R. 19-20). Paragraph IX of the Answer denies the allegations of Paragraph 16 of the Motion, refers to the large majority of their employees in the Brotherhood and Locals, and to Section 9(a) of the Act, and the interpretation of this Court of the provisions of the Order of the Board, and particularly refers to the accompanying affidavits of Mr. Carlisle and Dr. Wittmer (R. 20-21).

Paragraphs X, XI and XII of the Answer deny each and every allegation of Paragraphs 17, 18 and 19 of the Motion (R. 20); and Paragraph XIII of the Answer denies any and every violation in any respect of the Order of Court or of the Board as modified (R. 21-22). Paragraphs XIV, XV and XVI, hereinabove referred to in the discussion under Point II of this Brief, set up the matters therein pointed out by these Respondents (R. 22-23).

Mr. Carlisle's affidavit (R. 26-40) denies "categorically and emphatically" that the Companies have violated the Order of Court or the Order of the Board as modified. With respect to the membership of employees in labor

organizations, he shows that as of March, 1939, the Companies had 37,059 employees, of whom some 1,820 were not eligible for membership in labor organizations, because of their supervisory duties; and that of the 35,239 eligibles, some are members of the I. B. E. W., some of the Amalgamated, and some of no labor organization. He further shows that of the eligibles, 22,892, about 64.9 per cent. are members of the I. B. E. W. in good standing, with dues fully paid, and had selected the I. B. E. W. as their representative for collective bargaining; that this membership was ascertained and verified by a detailed count and check February and March, 1939, in the manner he later describes. As of the time covered by the proofs before the Board and this Honorable Court, that is, as of June, 1937, the I. B. E. W. was shown to have 60 per cent. of the employees with dues paid up; and in March, 1939, the percentage, shown by the verified records, was 64.9 per cent.

His affidavit proceeds to state that the membership of the CIO among the Companies employees has not been stated or described, although, as he expressly states, the moving papers show that the CIO had been invited by him to submit a statement or proof of its membership, *which was never done.* His affidavit further states "the greater part of our employees who are not members of the I. B. E. W. are members of no Union" (R. 28-29).

Mr. Carlisle's affidavit then states that in dealing with the claims of the rival organizations among their employees, he kept in mind, and has been advised of the effects of, Section 9(a) of the Act, which Section is quoted in the affidavit; following which, the affidavit expressly states *"In the moving papers on this motion, I*

find no statement of CIO membership and no facts which are claimed to show or indicate a CIO majority" (R. 29).

Mr. Carlisle's affidavit next refers to the collective bargaining contracts in force between the I. B. E. W. and its seven Local Unions and the Companies. Referring to essential provisions of the contracts, the affidavit proceeds to state *"the advantages of such contracts to the public, the employees and the Companies are obvious, and have been commented on by the Supreme Court."* A contract is annexed as an exhibit; and the affidavit then recalls that the validity of the contracts was adjudicated by this Court and the Board's Order accordingly modified so as to take out the clause invalidating them; and that by the action of the Local Unions composing a substantial majority of the employees of the Companies, the contracts have been continued in full force and effect (R. 29-30).

The affidavit then demonstrates the Companies' compliance with the Order of the Board as modified and granted enforcement, the particulars whereof are set forth in Paragraph III (8), (9), (10) and (11) of the Answer, reference being particularly made to the accompanying affidavit of Charles H. Woods respecting the facts as to the Board's checking and verification of the Companies' compliance (R. 30-31). Paragraph IV (12) and (13) of the Answer, referring to the recent checking and verification of the extent of I. B. E. W. membership among the Companies and to the affidavit and report of Dr. J. J. Wittmer, Personnel Director, together with special reference to Exhibit F, appears on pages 32-34 of the Record and has been herein heretofore alluded to.

Mr. Carlisle's affidavit then sets forth in detail the attitude, policy and action of the Companies as to collective

bargaining matters and the status of the Amalgamated (CIO). (Paragraph V (14), (15) and (16) (R. 34-36), which have been hereinabove referred to).

The attention of this Honorable Court is respectfully asked to Paragraph [redacted] of the [redacted] AFFIDAVIT (R. 36), to the effect that neither the Board nor its Regional Director has at any time informed or advised the Companies that they were not complying with the Order of Court; that no complaint of violation, or proceeding based on violation, of the Order of Court has been initiated by the Board; that no one connected with the Amalgamated or the CIO has brought to his (Mr. Carlisle's) attention any of the matters now complained of other than those considered and replied to in the correspondence previously referred to in the affidavit, in which correspondence he, Mr. Carlisle, reiterated his purpose that any claimed violations brought to his attention would be dealt with "promptly and adequately".

Thereupon, in Paragraph VI of the affidavit are set forth a summary of the charges and grounds of the Motion and a summary of the Companies' reply thereto, with specific reference to the affidavits accompanying Mr. Carlisle's affidavit. It is respectfully believed by these Respondents and is respectfully submitted by them, that the Answer, accompanying affidavits, and the summary of replies, upon the part of the Companies, each and all stated with marked directness and distinctness, sustain the position and contention of these Respondents herein that the Amalgamated's Motion and accompanying affidavits are insufficient to show violation of the Court's Decree of January 21, 1939, granting enforcement of the Board's Order of November 10, 1937, as modified and interpreted by the Opinion and judgment of this Honorable Court.

IV.

Not Any of the Grounds or Reasons for Certiorari Referred to in Supreme Court Rule 38, Section 5 (b), Is Shown in the Petition Herein.

Supreme Court Rule 38, Section 5, declares the principle, well settled by this Court, that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The Rule then indicates the character of reasons which will be considered in determining whether or not the writ shall issue in a particular case. Paragraph (b) of Section 5 deals with the writ to review decisions of Circuit Courts of Appeals, and indicates the character of reasons for granting the writ, which will be considered in connection with the decisions of those courts, as follows:

Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter;

Or has decided an important question of local law in a way probably in conflict with applicable local decisions;

Or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority;

Or has decided an important question of federal law which has not been, but should be, settled by this Court;

Or has decided a federal question in a way probably in conflict with applicable decisions of this Court;

Or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such

a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Now, whilst the above enumeration is "neither controlling nor fully measuring the Court's discretion", they quite comprehensively cover the substantial field wherein certiorari will issue to review decisions of a Circuit Court of Appeals.

It is respectfully submitted that the Petition for Certiorari in this case, and the Brief supporting it, fail to show any reasons of the character prescribed by the Rule.

1. No conflict is shown in the decision of the Circuit Court below with the decision of any other Circuit Court of Appeals on the same matter.

2. The decision of the Court below does not deal with any question of local law.

3. The Petition fails to show that the decision below was of an important question of *general law*, regardless of the further requirements which the Rule prescribes with respect to such Decisions.

4. The Petition fails to show that the Decision below is of an important question of federal law, which has not been, but should be, settled by this Court. The Decision below is clearly sustained by the Decisions of this Court construing and giving effect to the National Labor Relations Act, wherein the exclusive powers of the Board with respect to proceedings before it under the Act and with respect to the enforcement of its Orders, have been considered and passed upon.

> "The power 'to prevent any persons from engaging in any unfair practice affecting commerce' has

been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: 'This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.'"

Myers v. Bethlehem Shipbuilding Co., 303 U. S. 41, 48, 51.

Newport News Shipbuilding Co. v. Schauffler, 303 U. S. 54, 57.

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 46, 47.

In the Matter of the Petition of the N. L. R. B., 304 U. S. 486; 82 L. Ed. 1482.

Moreover, the Decision of this Court upon the virtually identical provision in the Federal Trade Commission Act with the provisions for procedure and enforcement in the National Labor Relations Act has adjudicated and settled the intent and effect of such legislation.

Federal Trade Commission v. Klesner, 280 U. S. 19, 25.

5. The Petition fails to show that the Circuit Court of Appeals in its Decision below decided the federal question in a way probably in conflict with applicable Decisions of this Court. The Decisions of those Courts are not in conflict, but concurrence.

Agwilines, Inc. v. National Labor Relations Board, 87 F. (2) 146, 150 (C. C. A. 5).

National Labor Relations Board v. Colton, 105 F. (2) 179 (C. C. A. 6).

National Labor Relations Board v. Hearst, 102 F. (2) 658, 664 (C. C. A. 9).

National Labor Relations Board v. Carlisle Lumber Company, 99 F. (2) 533, 537 (C. C. A. 9).

6. And the Petition also fails to show that the Court below, in its Decision herein, has so far departed from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

CONCLUSION.

Accordingly, it is respectfully submitted, for the Respondents, the International Brotherhood of Electrical Workers and Local Unions, that the said Petition of the Amalgamated Utility Workers for a Writ of Certiorari should be denied.

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1939.

NO. 342.

AMALGAMATED UTILITY WORKERS, Affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, ETC., *Petitioner*,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and ITS AFFILIATED COMPANIES, ET AL., *Respondents*,

In the Matter of the Application of
AMALGAMATED UTILITY WORKERS, ETC.,
To Punish
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and ITS AFFILIATED COMPANIES,
For Contempt.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL.,

v.

NATIONAL LABOR RELATIONS BOARD,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL.,

v.

NATIONAL LABOR RELATIONS BOARD,

ON WRIT OF CERTIORARI TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-825, ET AL.

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OPINIONS BELOW.

The Memorandum Opinion of the Court below (R. 13) is reported in 106 Fed. (2) 991.

JURISDICTION.

The Order of the Court below (R. 63) was entered on June 2, 1939. Petitioner (hereinafter sometimes referred to as the "Amalgamated") seeks to invoke the jurisdiction of this Court by virtue of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, sec. 1, and Section 10(e) of the National Labor Relations Act.

Petitioner's Motion for an adjudication of contempt against the Respondent Companies, and also that the Court take such action as shall appear just, reasonable and necessary to make effective the Order of the Board as ordered to be enforced by the Court below, and also for general relief as the nature of the case may require, was made and entitled (R. 1) *in the review proceedings instituted, respectively, by the Respondent Companies and by these Respondents, the International Brotherhood of Electrical Workers and seven of its Local Unions, made up of employees of the Respondent Companies, under Section 10(f) of the Act, which were before this Court at the October Term of 1938 and decided on December 5, 1938* (305 U. S. 197). In those proceedings, the Board's Answer asked the Circuit Court of Appeals to *enforce the Board's Order* (95 Fed. (2) 392).

The Matter came before the Court below upon the Petitioner's Notice of Motion and Petition (R. 4-13) with accompanying affidavits, the Motion of the Brotherhood and its said Local Unions to dismiss the said Notice of Motion and Petition of the Amalgamated, the Motion of the Respondent Companies, similar to that of these Respondents, to dismiss the said Notice of Motion and Petition of the Amalgamated, the verified Answer of the

Respondent Companies (R. 14-25), and the answering Affidavit of Floyd J. Carlisle with Exhibits A to H, both inclusive (R. 26-62), showing the Respondent Companies' compliance with the Decree of January 21, 1939.

The Motion of the Brotherhood and its Locals to dismiss the Amalgamated's Petition was ordered by this Court (R. 69), on October 16, 1939, to be inserted in the Record, and appears therein at pages 66-68.

QUESTIONS PRESENTED.

Petitioner has stipulated (R. 2) its intention to bring up for review, and to rely upon, *only* the question as to *whether or not it has standing to make and maintain the Motion, denied by the Court below, to adjudge the Respondent Companies in contempt of Court for alleged violations of the final Decree,* entered upon the application of the National Labor Relations Board, by the Court below on January 21, 1939 (R. 8-9), directing the enforcement of the Board's Order of November 10, 1937, as modified in accordance with the mandate of this Court (305 U. S. 197).

STATUTE.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Sup. II, Title 29, Sec. 151 *et seq.*) are Section 5, Section 6, Section 9, Section 10(a), (b), (c), (d), (e) and (f), and Section 11(1), (2), (3), (4) and (6).

STATEMENT.

The cause, in the Court below, in which the Petitioner's Motion for an adjudication of contempt was filed, as will be seen by reference to its title (R. 1, 4 and 8), was the consolidated proceedings by these Respondents and the Respondent Companies, respectively, under Sec-

tion 10(f) of the Act, to review and set aside the Board's Order of November 10, 1937. The Court below, in said cause, denied relief to these Respondents and the Respondent Companies (95 F. (2) 390), and directed the enforcement of the Board's Order. On Certiorari to the Court below to review said decision, this Court, on December 5, 1938 (305 U. S. 197), directed that the decree in the cause be modified so as to hold unenforceable the provision of Paragraph 1(f) of the Board's said Order, and the application to that provision of Paragraph 2(c) of said Order.* Thereafter, and in accordance with the Mandate of this Court, the Court below, on January 21, 1939, by its final Decree in the cause (R. 8-9), duly modified its original Decree as this Court had directed.

These Respondents, together with the Respondent Companies, were made Respondents in the said proceeding for the adjudication of contempt (R. 1, 8). The Petitioner's Notice of Motion (R. 3) was addressed by Petitioner to counsel for these Respondents (R. 4) as well as to counsel for the Respondent Companies, and to the General Counsel of the Board in Washington, D. C., and its acting Regional Attorney in New York City. Thereafter, Motions to Dismiss Petitioner's said Motion and Petition, on behalf of these Respondents and the Respondent Companies, as well as the verified Answer of the Respondent Companies, with supporting affidavits, referred to above, were filed in the cause. The Motions to Dismiss were argued, and supporting Briefs submitted to the Circuit Court of Appeals, by Counsel for both groups of Respondents who, respectively, filed said Motions.

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* Paragraphs 1(f) and 2(c) of the Board's Order (R. 6-7) had required the Respondent Companies to cease and desist from giving effect to their contracts with these Respondents, and to post notice to the employees of said Respondent Companies stating, among other things, that they would cease and desist in the manner aforesaid.

The Petitioner's Motion (R. 4-13) alleges, in detail, the *proceedings in the cause from their inception before the Board*, to the Board's Order of November 10, 1937, and also the ensuing proceedings to the final enforcing Decree of January 21, 1939. The relief sought against the Respondent Companies, and their respective officers, directors and agents, was that they be adjudged in contempt of the Court below for having failed to comply with its Decree of March 21, 1938, as amended by its Decree of January 21, 1939, and there is added a comprehensive prayer that "thereafter this Court take such action as shall appear just, reasonable and necessary *to make effective the Order of the Board" as ordered to be enforced by the Court below*, and also for *general relief*.

It is to be noted that Petitioner did not file its Motion and Petition as a person aggrieved under Section 10(f) of the Act, nor is there any citation or mention in said Motion and Petition of any provision of the Act, or of the Board's Rules and Regulations, or of any Statute whatsoever, under which jurisdiction was alleged or intimated to exist.

Without reviewing in detail the many allegations of Petitioner's Motion upon which the relief it prays is based, we deem it sufficient for the purposes of this statement, merely to direct attention to *the pervading averments therein showing these Respondents' serious interest in and integral connection with the subject matter involved.**.

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* It is stated in paragraph 4, erroneously, as the Record in the cause in this Court in the October Term, 1938, shows, that "The I. B. E. W. and certain locals thereof applied for permission to *intervene*, which permission was granted." These Respondents, in that case, petitioned the Court below, under Section 10(f) of the Act, as persons "aggrieved," to review and set aside the Board's Order of November 10, 1937.

Virtually all of the matters complained of in the Petition consist of alleged conduct upon the part of the Respondent Companies with and respecting these Respondents, the I. B. E. W. Brotherhood and Locals (R. 9, 10, 11, and 12).

The Motion of these Respondents, and the Motion of the Respondent Companies, to dismiss the Amalgamated's Petition were argued by their respective Counsel in the Court below.

The *grounds* asserted and assigned by these Respondents in support of their said Motion to dismiss the Amalgamated's Petition were, among others, (1) that the Petitioner had no standing, under the Act or otherwise, to institute and maintain the proceeding as said Petitioner, under its Notice of Motion and Petition, was attempting to do; and (2) that the attempted proceeding of Petitioner was in disregard of the Opinion and Mandate of this Court, in the review proceedings in which the Motion was entitled and brought, which Opinion interpreted parts of the Board's Order on which the said Motion relied; and that the Motion was in effect to secure an enlargement and modification of the Board's said Order and the final decree of the Court below, so as to make the Board's Order as modified determine and prohibit matters not determined and prohibited by such Order and Decree.

The Respondent Companies, in both their Motion to Dismiss the Petition of the Amalgamated and their Answer to it on the merits (R. 23), asserted, among other substantial grounds, that the Petitioner had no standing, under the Act or otherwise to institute and maintain the proceeding. The Respondent Companies clearly es-

tablish in their said Answer (R. 14, 22-23) that approximately 65 per cent of their eligible employees are fully paid-up members of these Respondents, and moreover that of the 35 per cent of the employees, outside of the Brotherhood and its Locals, a decided majority are *not members of the Amalgamated,* but of no union at all (R. 28-29). Mr. Carlisle's affidavit states expressly that the membership of the C. I. O. among the Companies' employees has never been stated or described, and even though the C. I. O. was particularly invited to submit a statement or proof of its membership, it was never done. He further states that "the greater part of our employees, who are not members of the I. B. E. W., are members of no union"; and that "in the moving papers on this motion, I find no statement of C. I. O. membership and no facts which are claimed to show or indicate a C. I. O. majority." (R. 29). The Companies further show, in their Answer and in the supporting affidavits (R. 26-62), compliance with Section 9(a) of the Act and with the Opinion and Mandate of this Court.

The Court below denied Petitioner's Motion and Petition, filing only a Memorandum Opinion, of which the full text is (R. 13):

> "Motion denied on ground that moving party has *no standing* to press a charge of civil contempt, if contempt has been committed. *Under the National Labor Relations Act the Board is the proper party to apply to the court for an order of enforcement and to present to the court charges that the Court's order has not been obeyed.*"

The action of the Court below on these Respondents' Motion to Dismiss, and also on the Respondent Compa-

nies' Motion to Dismiss, rendered without opinion, were Decrees reading (R. 68):

> "Motion denied on ground that the matters submitted in support thereof should properly be asserted in opposition to the Amalgamated Utility Workers' motion to punish for contempt."

However, it perfectly appears that the action of the Court below in dismissing the Amalgamated's Motion and Petition was explicity and literally upon the specific ground principally urged in the Motions to Dismiss filed by both the Respondent Brotherhood and Local Unions and the Respondent Companies that the moving party had no standing to press a charge of civil contempt, if contempt has been committed, and that Under the National Labor Relations Act the Board is the proper party to apply to the Court for an Order of enforcement and to present to the Court charges that the Court's Order has not been obeyed. The Brotherhood and its Locals relied on this basic ground, assigned in their Motion to Dismiss, that, as *matter of law*, the Petitioner had no standing to maintain its Petition for an adjudication of Contempt. The *Act* itself, as the *law* of the case, made it unnecessary to file an Answer. And that determinative matter or question of *law* arose and presented itself for decision upon the Petitioner's Motion and Petition *per se*, and irrespective of the matters set up in the Companies' Answer and supporting Affidavits, and was *so disposed* of in the Memorandum Opinion, and the final Order of the Court below dismissing the Motion and Petition.

ARGUMENT.

I.

The Petitioner Had No Right or Standing, Under the National Labor Relations Act, or Otherwise, to Institute and Maintain Its Proceeding Herein for the Order It Prayed to Punish for Contempt, Because Under the Act the Board Alone Is the Proper Party to Apply to the Court for an Order of Enforcement and to Present to the Court Charges That the Court's Order Has Not Been Obeyed.

The Court below held that the "moving party has no standing to press a charge of civil contempt, if contempt had been committed. *Under the National Labor Relations Act the Board is the proper party to apply to the Court for an order of enforcement and to present to the Court charges that the Court's order has not been obeyed*". (R. 13).

The soundness and correctness of the Decision of the Court below upon this point does not, it is respectfully submitted, admit of reasonable doubt. The effect of the Act itself is so plain as to exclude any substantial question as to the propriety of the Court's Decision.

Petitioner had no lawful standing or authority under the Act, or otherwise, to institute and maintain its proceeding and Motion in the Court below for contempt. It is respectfully submitted that only the Board is authorized by the Act to enter Orders under and within the scope of the Act, to petition the Circuit Courts of Appeals, or, in the alternative, the other Federal Courts designated by the Act, to enforce its Orders, and, for the protection of those for whom the Act authorizes the

Board to enter its Orders and to apply to the Courts for their enforcement, to take action to have the Courts punish for contempt those who violate the decrees of the Courts enforcing the Board's Orders. That such is the effect and intent of the Act is apparent throughout its context and particularly in Section 5; Section 6; Section 9; Section 10(a), (b), (c), (d), (e) and (f) and Section 11(1), (2), (3), (4), and (6).

If private parties, whether individuals or labor organizations, irrespective and independent of action by the Board, could institute proceedings to punish for contempt for violations, including continued violations, of the Board's Orders and of the Decrees, enforcing such Orders, then any such parties could renew and continue the litigation of the questions involved in the proceedings upon which the Board and the Courts had passed, without end. And instead of the Board, upon its responsibility under the Act, being the official Actor in the proceedings to protect its Orders and effectuate the Act, any employee or group of employees could usurp and assume that exclusive function and duty of the Board. The purposes of the Act, and the authority and duty of the Board thereunder to pass the orders provided for by the Act for the protection of those whom the Board is constituted to protect, make and establish the Board as the sole functionary or agency appointed and directed to afford such protection, and to effectuate such protection by securing the enforcement of its Orders by the decrees of the Courts upon its, the Board's, application to that end, and *a fortiori*, if the decrees of the Courts so passed be disobeyed or violated by the persons who are directed to obey them, it is the exclusive function and duty of the Board to ask the Courts to enforce their decrees by

supplemental decrees, or by proceedings for contempt, or in such manner as may be appropriate to the particular occasion. If parties other than the Board had the right to anticipate and forestall the function of the Board to apply to the Court for enforcement and effectuation of the Board's Orders, and for enforcing and effectuating the Courts' decrees passed specifically to enforce the Board's Orders, then the powers and duties of both the Board and the Courts, *as definitely ascertained and marked out by the Act*, would be subject to invasion and usurpation by unofficial parties, and the effectuation of the Act and of the powers and duties of the Board would be thrown into endless confusion. In brief, the Act has exactly, throughout its several provisions, established and commanded the Board to protect the rights of those whom the Board and its powers were ordained to protect, and it is for the Board exclusively to exercise those functions in the public interest, without power upon the part of the Board to abdicate them, and without the right upon the part of anyone else, individual or organization, to invade or usurp them.

If employees are injured, in violation or derogation of the Act, by the failure of any employer to obey and carry out a decree of a Court enforcing an Order of the Board, the plain, appropriate remedy of such employees is to *apply to the Board* to take steps to relieve them of their injury by applying to the Court to enforce its own decree whether by contempt proceedings or other appropriate mandate or remedy. The Board may pass and enter an Order, and then may decide never to ask for its enforcement, or at any time, prior to filing a transcript of the record in a Circuit Court of Appeals upon a petition for enforcement or for review, it may *vacate or mod-*

ify its Order, and the individual or union, upon whose complaint the Board acted by instituting the proceeding, has not the slightest right to require the Board to apply to the Court for the enforcement of its Order, or to proceed for enforcement, or resist a review, if, before filing the transcript, it decides to rescind or change its Order.

Meyers v. Bethlehem etc. Co., 303 U. S. 41; 48; 49, 50; 51.
Newport News etc. Co. v. Schauffler, 303 U. S. 54; 57-58.
Petition of N. L. R. B., 304 U. S. 486; 492-494; 495.

The similar corresponding language of *the Federal Trade Commission Act* does not give any right to a person aggrieved by any violation of that Act to a proceeding or remedy to enforce that Act by proceedings for contempt or in any other manner. In this respect the National Labor Relations Act was explicitly analogized to the Federal Trade Commission Act in the Report of the Committee of the House of Representatives submitted to the House with the formulated Bill, which became the National Labor Relations Act, and the Committee's recommendation of its passage. In that Report, No. 972 of the 74th Congress, the Committee said:

> "The Board is empowered, according to the procedure provided in Section 10, to prevent any person from engaging in any unfair labor practice listed in Section 8 'affecting commerce', as that term is defined in Section 2(7). *This power is vested exclusively in the Board and is not to be affected by any other means of adjustment or prevention.* The Board is thus made the *paramount agency* for dealing with the unfair labor practices described in the bill.

> *"The procedure provided is analogous to that in the Federal Trade Commission Act (Sec. 5) and is familiar to all students of administrative law. * * **
>
> *"* * * No private right of action is contemplated.* Essentially the unfair labor practices listed are matters of *public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint.* The form of injunctive and affirmative order is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by law declared to be detrimental *to the public weal."*

The above specific declaration of the House Committee, condensed but undiminished in substance, is expressed in Section 10(a) of the Act itself:

> "Sec. 10(a). The *Board* is empowered, as hereinafter provided, to prevent *any* person from engaging in any unfair labor practices (listed in section 8) affecting commerce. *This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."*

The power provided by the Act to relieve against and prevent unfair labor practices is thus not only vested in the Board, but is made unmistakably "exclusive", and not only "exclusive" but so utterly and absolutely "exclusive" that it is additionally declared by the Act that it, the said power, "shall *not be affected* by any other means of adjustment or prevention that has been or may be established by *agreement, code, law, or otherwise."*

Nor does the Act leave the matter, as an absolutely exclusive power in the Board alone, to rest even upon those provisions, comprehensive, conclusive and secure

as they obviously are. It expressly, consistently and decisively vests *all power of enforcement in the Board alone, confines the power there* and *excludes and precludes its existence anywhere at all outside of the Board.* All the enforcement powers of Section 10, in terms too plain to admit of any doubt, concur specifically and invariably to that effect and that end. The Act empowers the *Board* to have its Orders *enforced* by the *Courts*, and declares the *Board's powers and those of the Courts* to be *exclusive!*

Besides, as is now fully settled and understood, the policy and purpose of the Act were to maintain an unburdened, unobstructed and uninjured interstate commerce, by preventing the burden, obstruction and injury which strife and interruptions growing out of labor controversies impose and inflict upon that commerce, which the Board is constituted and empowered, as the responsible and exclusive public agency, to protect. The paramount policy and purpose of the Act were so expounded and declared by this Court in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 37-41; *Consolidated Edison Company of New York, Inc., and International Brotherhood of Electrical Workers v. National Labor Relations Board*, 305 U. S. 197, 220-221; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601.

The Decision below is clearly sustained by the Decisions of this Court construing and giving effect to the National Labor Relations Act, wherein the exclusive powers of the Board with respect to proceedings before it under the Act and with respect to the enforcement of its Orders, have been considered and passed upon.

"The power 'to prevent any persons from engaging in any unfair practice affecting commerce' has

been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: 'This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.'"

Meyers v. Bethlehem Shipbuilding Co., 303 U. S. 41, 48, 51.

Newport News Shipbuilding Co. v. Schauffler, 303 U. S. 54, 57-58.

In the Matter of the Petition of the N. L. R. B., 304 U. S. 486; 492-494; 495.

Moreover, the Decision of this Court upon the virtually identical provisions, in the Federal Trade Commission Act, with the provisions for procedure and enforcement in the National Labor Relations Act has adjudicated and settled the intent and effect of such legislation.

Federal Trade Commission v. Klesner, 280 U. S. 19, 25.

In *Federal Trade Commission v. Klesner*, 280 U. S. 19, this Court, speaking of Section 5 of the Federal Trade Commission Act, with which the Report of the Congressional Committee substantially identified the procedure prescribed in the Wagner Act, said (p. 25):

"* * * Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of

course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it."

Each and every one of the salient matters referred to in the above excerpt from the Opinion in the Klesner Case applies under the provisions of and the procedure prescribed by the National Labor Relations Act, and it is noteworthy that such has been the procedure invariably obtaining and never departed from under the operation of the Act, and now firmly settled as the practice without exception.

It is clear under the Federal Trade Commission Act, and equally clear under the National Labor Relations Act, that a private person, corporation or other entity may not file or maintain any complaint which may be prosecuted before the Commission under the former Act, or before the Board under the latter. Under both Acts, if there is to be any prosecution of any complaint or proceeding against any alleged offender, it must be by and in the name of the Commission or the Board, representing and acting as and for the Government, which alone initiates, maintains, conducts and defrays the expense of the proceeding, in every instance, exclusively and alone.

Moreover, the Decision of the Court below concurs and is entirely uniform with decisions of other Circuit Courts of Appeals in their potential denial of any standing on the part of an employee or a union of employees to maintain proceedings in Court for *the enforcement of orders of the Board*. The holding in other Circuits is that the procedure provided by the Act is not and cannot be

"made a private one to enforce a private right. It is a public procedure looking only to public ends."

Agwilines, Inc., v. National Labor Relations Board, 87 F. (2) 146, 150 (C. C. A. 5).
National Labor Relations Board v. Colton, 105 F. (2) 179 (C. C. A. 6).
National Labor Relations Board v. Hearst, 102 F. (2) 658, 664 (C. C. A. 9).
National Labor Relations Board v. Carlisle Lumber Company, 99 F. (2) 533, 537 (C. C. A. 9).

An employee or a union of employees may *file a charge with the Board* under the Act, Section 10(b), *but, upon their own part, may not proceed beyond that.* The Board alone may and must decide whether or not it will make or issue a complaint upon the charge and whether or not any proceeding thereon shall ensue. If the Board decides that there shall be such complaint and proceeding it retains exclusive and complete control over every following stage of the hearing, decision and the proceeding, if any, to enforce its decision. Even after rendering a decision and order the Board may decide, in its own discretion, to rescind or modify it, or not to ask for its enforcement in either its original or modified form, and no one, employee or union of employees, or employer, or any other governmental authority, may control, or impose any restriction or requirement upon, the Board's discretion to apply or not to apply to the Court for an enforcement of its order at any stage or in any respect. *Re, National Labor Relations Board*, 304 U. S. 492-495. The only qualification to the power and discretion, above stated, of the Board is the right of *"any person aggrieved" by an Order of the Board* (*not* by a *Decree* of a Circuit Court of Appeals *enforcing* such Order)

to petition the Courts designated in Section 10 of the Act to *review* and *either set aside or modify an Order of the Board.*

It is thus plainly manifest that no person or association or union of employees have any standing in Court respecting an Order of the Board in any particular, unless they are *"aggrieved"* by the Order and that such standing, as a person aggrieved by the Order, is strictly limited and confined to a proceeding by petition to the Court to review the Order and set it aside or modify it. All the sub-paragraphs of Section 10, and particularly Section 10(f), are, beyond misunderstanding, to that effect.

Not only the sub-paragraphs of Section 10, but as mentioned hereinabove, Section 5, Section 6, Section 9, and Section 11 (1), (2), (3), (4) and (6) of the Act, have the same unmistakable intendment. Section 5 and Section 6 vest in the Board, solely, full and complete discretionary authority to "prosecute any inquiry necessary to its functions" and to "make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this Act." *Section 9*, dealing with and providing for *"Representatives and Elections,"* provides that representatives designated or selected for the purposes of collective bargaining by the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in such unit for such purposes, and affords to employees the right to present grievances to their employer, and proceeds to prescribe the powers of the Board to secure such representation in the manner provided.

Under "Prevention of Unfair Labor Practices," Section 10(a) *expressly* makes the power of the *Board*, in

its function designated in the caption to the Section, *absolutely exclusive.*

Subsection (b) provides that whenever "*it is charged*" that any person has engaged or is engaging in an unfair labor practice, the Board, or any agent designated by the Board for such purposes, shall have the power to issue and cause to be served upon such person a complaint, etc., containing a notice of hearing before the Board, etc. The Section does not specify the person or persons by whom such charge may or shall be made. If *any* person who makes *any* such charge acquires thereby the right to control or direct the proceeding before the Board upon a complaint issued by it, or to enforce an Order of the Board made thereon, or to apply to a Circuit Court of Appeals to enforce such an Order, then such rights inhere in a countless number of persons, by whom the administration and effectuation of the Act may to an extent without assignable limits be shared with, or withdrawn from, the Board itself. The administration and enforcement of the Act could be taken over by an indefinite number of persons to the inestimable detriment of the functions and responsibilities of the Board. On the contrary, whilst a *charge* may be *made to the Board*, subsection (b) gives no further rights to the person making the charge, but lodges all power respecting it in the Board alone, until, under subsequent provisions of Section 10, the *Board* is empowered to apply to a Circuit Court of Appeals to *enforce* its Order.

Subsection (c) plainly vests exclusive power in the Board respecting the matters which that subjection deals with. And subsection (d) expressly provides that until a transcript of the record shall have been filed in Court, upon an application by the Board for enforcement, or

upon a Petition to the Court by a party aggrieved by an Order of the Board to review it, "the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or Order made or issued by it". Subsection (e) confers upon the Board the power to petition the designated Courts "for the enforcement of its Order and for appropriate temporary relief or restraining Order", and requires the Board to file in the Court a certified transcript of the Record in the proceeding, etc., whereupon the jurisdiction of the Court *shall be exclusive*, etc. Subsection (f) gives to "any person aggrieved by a final Order of the Board" the right to *obtain a review* of such Order in any of the designated Courts *by filing in such Court a written Petition* praying that the Order of the Board be modified or set aside and, upon the filing of the certified transcript, the Court "shall have the *same exclusive* jurisdiction to grant *to the Board* such temporary relief or restraining Order as it deems just and proper, and in like manner to make and enter a Decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the Order of the Board".

Plainly all these powers are to be exercised by the Board and said Courts *exclusively*.

Section 11 vests the *Board* with "Investigatory Powers" for the purpose of *all hearings and investigations*, which, in the opinion of the Board, are *necessary and proper for the exercise of the powers vested in it by Section 9 and Section 10*. By sub-section (1) the Board is given the right of access to any relevant evidence of any person being investigated or proceeded against, and to issue subpoenas and administer oaths; by sub-section (2),

in cases of contumacy or refusal to obey such subpoenas, designated Courts, upon application by the Board, are given jurisdiction to enforce appropriate obedience; sub-section (3) contains provisions relating to self-crimination in giving evidence in obedience to the subpoena of the *Board;* sub-section (4) provides methods for the service of the *Board's* processes and provides that fees and mileage of witnesses summoned before the Board shall be the same as those in the Courts of the United States; and by sub-section (6) the *Board,* upon its request, may, when the President so directs, obtain all records, papers and information from the several departments and agencies of the Government relating to any matter before the Board.

It is respectfully submitted that there is not a word in any section or provision of the Act which sanctions the contention that any one, other than the Board itself, may take over or execute any of the powers or functions which the Act confers and imposes upon the Board alone. The Act throughout negatives any such assumption.

II.

Petitioner's Motion, Which the Court Below Denied, Contravenes the Opinion and Judgment of This Court in the Review Proceedings in Which It Is Entitled and Brought, Which Opinion Interpreted the Parts of the Order of the Board on Which the Motion Mainly Relies; the Motion Being in Effect to Secure an Enlargement and Modification of the Order of the Board and the Final Decree of the Court Below and to Expand the Scope and Operation of the Order and Decree, so as to Make the Board's Order as Modified Apply to and Determine and Prohibit Matters Not Litigated, Determined and Prohibited by the Order and Decree.

The Motion of the Petitioner is in derogation of the Opinion and Judgment of this Court, rendered December 5, 1938, in the review proceedings in which the Motion herein is entitled and brought. In its Opinion, this Court construed and limited the particular parts of the Order of the Board upon which the Motion herein for contempt materially relies. The Opinion of this Court discloses that the Motion herein is largely to secure a modification and enlargement of the Order of the Board in excess and beyond the limitations which this Court expressly put upon the Board's Order. Such an expansion of the scope and operation of the Order of the Board and the Decree of the Court below, pursuant to the Opinion and Mandate of this Court in directing the modification of the Board's Order, would be directly in contravention of the Opinion and Mandate of this Court and, in effect, impair and undo an essential part of that Opinion and Mandate.

With reference to this subject, the substance of the complaint of the Amalgamated, set forth in detail

throughout its Petition, is of things alleged to have been done by the Companies, and things which the members of the Brotherhood Unions, these Respondents, are alleged to have done with the sanction of the Companies. *The essence and burden of the Motion and complaint are that the Companies have continued to bargain collectively and deal with these Respondents, the Brotherhood and its Locals, in recognition and pursuance of the contracts, between the Companies and these Respondents, which this Honorable Court saved from abrogation and upheld as valid and operative, instead of bargaining and dealing with the Amalgamated.*

The recalcitrant attitude of the Petitioner toward this Court's Decision upholding the contracts between Companies and these Respondents, and declaring the effect of Paragraph 1 (g) of the Board's Order of November 10, 1937 (305 U. S. p. 239) is apparent upon page 6 of the Petitioner's Brief, stating that "Respondents started a drive of its employees into the I. B. E. W. And that *this drive resulted in the transformation of the seven company unions into seven alleged 'locals' of the I. B. E. W.; and the execution of so-called collective bargaining agreements between the Respondents and the said company unions, rechristened 'local unions' of I. B. E. W., during the pendency of the proceedings before the National Labor Relations Board. It is these contracts that were intended to be reached by paragraph 'f' of the Board's order quoted above.*"

The Amalgamated's Motion and Petition, and its complaint therein, are founded and asserted upon Paragraph 1(f), *formerly 1 (g)*, of the Board's Order of November 10, 1937, which provides that the Companies shall "cease

and desist" from "Recognizing the International Brotherhood of Electrical Workers as the exclusive representative of their employees".

This Court will recall that, with reference to said Paragraph 1(g) of the Order, it declared in its Decision of December 5, 1938, of the cases presented by the Petition of the Companies and the Petition of the Brotherhood and its Locals:

> "Subdivision (g) of that paragraph, requiring the companies to cease recognizing the Brotherhood 'as the exclusive representative of their employees', stands on a different footing. The contracts do not claim for the Brotherhood exclusive representation of the companies' employees but only representation of those who are its members, and the continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of 'representation' should arise. Section 9. *We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act. So construed, that subdivision merely applies existing law.*"

With reference to the making of these contracts, this Honorable Court in its Opinion rendered by Mr. Chief Justice HUGHES, page 232 of 305 U. S., said:

> "It also appears from the evidence, which was received without objection, that the Brotherhood and its locals comprised over 30,000 or 80 per cent of the companies' employees out of 38,000 eligible for membership."

And at pages 236-237, the Court further said:

"The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under Section 7 the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The 80 per cent. of the employees who were members of the Brotherhood and its locals, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. * * * The Board by its order did not direct an election to ascertain who should represent the employees for collective bargaining. Section 9 (c). Upon this record there is nothing to show that the employees' selection as indicated by the Brotherhood contracts has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute. * * * Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce. They contain no terms which can be said to 'affect commerce' in the sense of the Act so as to justify their abrogation by the Board. *The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period.*"

And at pages 237-238, the Opinion of His Honor, the Chief Justice of this Court, further states:

> "The Board insists that the contracts are invalid *because made during the pendency of the proceeding*. But the effect of that pendency would appropriately extend to the practices of the employers to which the complaint was addressed. See Jones v. Securities & Exch. Commission, 298 U. S. 1, 15, 80 L. ed. 1015, 1020, 56 S. Ct. 654. It did not reach so far as to suspend the right of the employees to self-organization or preclude the Brotherhood as an independent organization chosen by its members from making fair contracts on their behalf."

And, further, upon page 238, the Court said:

> "The Brotherhood was entitled to form its locals and their organization was not assailed. The Brotherhood and its locals were entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. To say that of the 30,000 who did join there were not those who joined voluntarily or that the Brotherhood did not have members whom it could properly represent in making these contracts would be to indulge an extravagant and unwarranted assumption."

And after concluding "that the Board was without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order", the Court expressed its judgment and determination, above recited, respecting subdivision (g), now (f), of Paragraph 1 of the Order.

As of March, 1939, a careful and exhaustive verification by the Respondent Companies and also by these Respondents, the Brotherhood and Local Unions, of the membership and dues records indicated 65% of the employees of the Companies as members of the Brotherhood and its Locals with dues fully paid. This is shown elaborate detail in the Affidavit of Mr. Floyd L. Carle and reference to the Affidavit of Dr. J. J. Wittmer, the printed Record herein. These Affidavits fully support Paragraphs VIII and IX of the Respondent Companies' Answer (R. 19-21), and also Paragraphs XIV, XV and XVI of their Answer (R. 22-23).

For the exhaustive details upon this subject, the attention of this Court is respectfully directed to the Affidavit Mr. Carlisle (R. 28-29) as to Membership of Employees Labor Organizations; and (R. 28-30) as to The Collective Bargaining Contracts in Force Between the I. B. W. and the Companies; and particularly (R. 32-36) upon recent Checking and Verification of the Extent of B. E. W. Membership Among the Companies; and see e Report of Dr. Wittmer, included in Mr. Carlisle's Affivit (R. 32-34) and Dr. Wittmer's conclusion (R. 34).

See also Exhibit "F": I. B. E. W. Membership Among nployees of the Companies, Determined from Review Membership Records During March, 1939 (R. 58).

It thus clearly appears that in making and continuing e contracts of these Respondents, the Brotherhood and Local Unions, with the Companies, 65% of the employees have selected and continued the Brotherhood d its Locals as their representative for the purposes of lective bargaining. Accordingly, it would seem that e essential object of the Amalgamated's Petition and

Motion was to avoid the conditions and proceedings sanctioned by this Honorable Court in its Opinion and Judgment in the cases in question and, in effect, to suppress or evade the clear determinations of this Court therein.

Moreover, the Opinion of His Honor, Mr. Chief Justice HUGHES, for the Court, in the cases referred to, refers repeatedly to Section 9(a) of the National Labor Relations Act in connection with the subjects embraced in the above-recited excerpts from the Opinion. That Section, 9(a), provides:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

In the *Jones and Laughlin case* (301 U. S. 1, 44), this Court held that the obligation to deal with the true representative imposes the negative duty to treat with no other. The Circuit Court of Appeals has held that there is no duty to bargain if the representatives are not the proper representatives of the majority in an appropriate unit. *Mooresville Cotton Mills v. National Labor Relations Board* (C. C. A., 4th), 94 Fed. (2nd) 61, affirmed on rehearing 97 Fed. (2nd) 959.

Under the rulings of the Board, the Companies were under no duty to bargain or deal also with a minority labor organization. The Board held in the case of *Mooresville Cotton Mills and Local 1221, United Textile*

Workers of America, 2 N. L. R. B. 1081, that it was not an unfair labor practice for an employer to refuse to discuss grievances with employees' representatives who do not represent a majority of an appropriate unit. See, also, *Matter of Williams Manufacturing Company, Portsmouth, Ohio*, 6 N. L. R. B. 30, where the Board dismissed the charge of violation of Section 8(5) of the Act because of the failure to show majority representation at the time requests to bargain were made. See, also, *Matter of M. Lowenstein & Sons, Inc.*, 6 N. L. R. B. 37, and *Matter of Titan Metal Manufacturing Company*, 5 N. L. R. B. 81.

CONCLUSION.

Accordingly, it is respectfully submitted, for the Respondents, the International Brotherhood of Electrical Workers and Local Unions, that the Decree of the Court below, dismissing the Petition, should be affirmed.

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Supreme Court of the United States

OCTOBER TERM—1939

No. 342

AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS

Petitioner

against

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its affiliated Companies, *et al.*

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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Supreme Court of the United States

OCTOBER TERM—1939

No. 342

AMALGAMATED UTILITY WORKERS, affiliated with UTILITY WORKERS ORGANIZING COMMITTEE, CONGRESS OF INDUSTRIAL ORGANIZATIONS

Petitioner

against

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its affiliated Companies, *et al.*

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Opinions below

The memorandum Opinion of the Court below (R. 13) is reported in 106 Fed. (2d) 991. The Order of the Court below was entered on June 2, 1939, and is at R. 63. The Opinion of this Court in the review and enforcement proceedings in which the present motion was made is reported in 305 U. S. 197.

Jurisdiction

Petitioner Amalgamated Utility Workers (hereinafter usually referred to as "the Amalgamated" or "the C I O") seeks to invoke the jurisdiction of this Court by virtue of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, Sec. 1; 43 Stat. 938), and Section 10 (e) of the National Labor Relations Act (Act of July 5, 1935; c. 372, 49 Stat. 449). The petition of the Amalgamated for certiorari was granted by this Court on October 16, 1939.

Statute

The statute to be construed is the National Labor Relations Act (hereinafter usually referred to as "the Act"). The particularly relevant parts thereof are Section 10, subdivisions (a), (e) and (f), which are set out in the Appendix hereto (pages 51 to 53, *post*).

Question Presented

Petitioner stipulated (R. 2) its intention to bring up for review, and to rely upon, only the question as to whether or not it has standing to make and maintain in Court the motion (R. 13) which was denied by the Court below. In terms of the Act, we state the question as follows:

> *Where the National Labor Relations Board (hereinafter usually referred to as "the Board") has filed its complaint and conducted hearings as to violations of Section 8 of the Act, has made findings and issued an Order thereon, and has requested and obtained the entry of a decree of enforcement, does the Act authorize or permit one of the contending labor organizations to make an application in such proceedings to the Court to adjudge the respondent employers in civil contempt of Court for alleged failure to comply with the Board's Order in the re-*

spects cited and to "make effective" the Board's Order and otherwise "as the nature of this case may require" (R. 13)—the Board having itself taken no such action?

The standing of the movant to make the motion is to be considered with relation to the motion it made; i. e., the several categories of matters as to which the Amalgamated asks for an adjudication of civil contempt and further enforcement, without investigation, findings or request by the Board. In the *first* category are matters not litigated before the Board, not within the specific language of its Order, and not in the contemplation of the parties at the time of the review and enforcement proceedings. In these respects the motion in effect seeks from the Court various supplements, extensions and virtual amendments of the Board's Order. These matters include (R. 11; par. 15) the adjustment of grievances with grievance committees constituted under the Contracts (305 U. S. 197, 231-239; R. 40-48) with the International Brotherhood of Electrical Workers affiliated with the American Federation of Labor (hereinafter referred to as "the I B E W"); bargaining exclusively with the I B E W under the Contracts while refusing to bargain with the Amalgamated (R. 11-12; pars. 16-17); permitting I B E W representatives to come on employer premises for grievance committee work (R. 36-37) and denying like privileges to the C I O (R. 9, par. 10; R. 61-62); honoring assignments voluntarily executed by individual members of the I B E W requesting the deduction of their I B E W dues from their pay (R. 10, par. 13, R. 37); the alleged discriminatory transfer of two boiler cleaners temporarily from one station to another (R. 11, par. 14; R. 37-38), and alleged favoritism by minor supervisors for the majority labor organization (R. 10, par. 13; R. 28-30), etc.

The *second* category relates to matters of an administrative character necessarily vested in first instance in the Board, such as the Amalgamated claim (R. 12, par. 19) that the Companies did not sufficiently comply with the Board's

directions as to posting notices. The record shows the Companies' full compliance (R. 30-31, 49-57; Exhibits B, C, D and E), the Board's investigation of the matter in the field, and the absence of any report or ruling by the Board that its directions had not been fully carried out (R. 31).

Under such circumstances the Court below ruled (R. 13)—

> "Motion denied on ground that moving party has no standing to press a charge of civil contempt, if contempt had been committed. Under the National Labor Relations Act the Board is the proper party to apply to the Court for an Order of enforcement and to present to the Court charges that the Court's Order has not been obeyed."

Statement

Petitioner's statement and argument proceed on the assumptions that the Act was designed, not to protect public rights and public interests, but to redress "private grievances" and confer "private rights" on labor organizations; that the petitioner's standing as a "party" as of right in the proceedings against the respondents was broadly recognized by the Board and all Courts; that the decrees entered on March 21, 1938, and January 21, 1939, were "secured by it" (Brief, page 9); and that under the Act any interested labor organization has been given, to the exclusion of the Board or equally with it, the right and the authority to enforce, by civil contempt if need be, the "private rights" created and conferred by the Act. The pertinent facts as to the proceedings are as follows:

In the exercise of its authority under Section 10(b) of the Act, the Board issued a complaint[1] which alleged unfair

[1] See Transcript of Record in Docket No. 19—October Term, 1938 (*Consolidated Edison Company* v. *National Labor Relations Board*, 305 U. S. 197), pages 7-16. Petitioner's present motion was made and entitled (R. 1) in the review and enforcement proceedings which were before this Court upon this Transcript of Record.

labor practices forbidden by Section 8, sub-divisions (1), (2) and (3), of the Act. A "charge" had been filed with the Board by a predecessor of the Amalgamated. The complaint as served was several times amended by the Board[1]. The proofs in support of the complaint were presented solely by counsel for the Board. The Amalgamated did not ask leave to intervene[2]. Attempted participation by its counsel during the taking of testimony was excluded by the Trial Examiner[3]. The I B E W did not ask to be made a party, did not take part before the Board, and was not served with the complaint as from time to time amended by the Board.[4]

The Board found against the employers on virtually all counts[5], except that the Board dismissed without prejudice[6] the allegations of violation of Section 8, subdivision 2, of the Act, which makes it an "unfair labor practice" for an employer "To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *". The Board's Order of November 10, 1937, directed the reinstatement of six named employees with back pay, and required the employers to cease and desist from giving effect to their Contracts with the I B E W and to do various other affirmative acts and things. For the Order and the modification thereof by the opinion of this Court in 305 U. S. 197, see pages 53 to 56 of the Appendix hereto.

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[1] Transcript of Record in Docket No. 19, pages 13-15.

[2] The Act provides, in Section 10(b), that "In the discretion of the member, agent or agency conducting the hearing or the Board, any other person [in addition to the person complained of] may be allowed to intervene in the said proceeding and to present testimony".

[3] Transcript in Docket No. 19, pages 338-339.

[4] See 305 U. S. 197, at pages 233-234.

[5] Transcript of Record in Docket No. 19, pages 217-218.

[6] As to the effect of this action as to the I B E W, see 305 U. S 197, at page 233.

A proceeding to review the Board's decision and Order was instituted by the employers as "aggrieved" parties under Section 10(f) of the Act (305 U. S. 197). As also "aggrieved" by the Board's Order, the I B E W instituted its review proceeding (R. 1), argued the same before the Circuit Court of Appeals, and petitioned for and obtained certiorari for review by this Court. In the review proceedings, the Board filed answers, which also asked for cross-relief by way of enforcement of its Order (95 Fed. (2d) 390, 392). The decree of enforcement entered March 21, 1938, was granted solely upon the "prayer" of the respondent Board, and so stated[1] (Transcript in Docket No. 19—October Term—1938, page 1748).

The Amalgamated's predecessor did not claim to be "aggrieved" by the Board's Order; it filed no petition for review; it instituted no proceeding to enforce the Order. Upon the hearing of the review and enforcement proceedings in the Circuit Court, counsel for the Amalgamated's predecessor asked the Court to permit his client "to intervene in this proceeding." He did not assert any right of intervention under Section 10(e), which empowers the Board to petition for the enforcement of an Order, or under Section 10(f), which authorizes a person "aggrieved" by an Order of the Board to petition that it be reviewed and thereupon vacated or modified. He asked only "that I be permitted to argue and file a brief on its behalf, both on the

[1] The Judgment read as follows: "IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT. CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et al., Petitioners *vs.* NATIONAL LABOR RELATIONS BOARD, Respondent. JUDGMENT—Filed March 21, 1938. Petitions by the Consolidated Edison Company of New York, et al., for review of an Order of the above named respondent, and a prayer by said respondent for enforcement of said Order having come on to be heard, Upon consideration thereof it is Ordered that the prayer of said respondent for the enforcement of the Board's Order be and the same is hereby granted. Wm. Parkin, Clerk. [File endorsement omitted.]"

motion for a stay, as well as on the final argument of this case on the merits." The Court granted this limited application by a notation endorsed "Motion Granted"[1]. The opinion of the Court designated the applicant merely as "intervenor" (95 Fed. [2d] 390, 392). Because counsel for the Amalgamated's predecessor had filed a brief and argued in the Circuit Court of Appeals in support of the Board's Order, his application to do the same things in this Court was not contested. Only in that sense and to that limited extent was the Amalgamated (or its predecessor) an "intervenor" or a "party" at any stage of the review and enforcement proceedings.

The final decree (R. 8-9) entered by the Court below upon the Board's application on January 21, 1939, in pursuance of the Mandate of this Court, struck from the Board's Order of November 10, 1937, the provisions of its Paragraph (f), which would have nullified the respondents' collective bargaining Contracts with the I B E W, the labor organization of which a large majority of the respondents' employees were undisputedly members at the time of the prior proceedings (305 U. S. 197, 232) and still are members (R. 28-29, 32-34, 58). Aside from the modification as to the Contracts, the enforcement decree of March 21, 1938, was affirmed; and that decree recited that "said Board having filed a request for the enforcement of said Order, issued on November 10, 1937" (R. 8).

Nature of the matters on which the petition asks adjudication

Petitioner's statement in this Court does not stress or make clear the nature of the relief sought and the nature

[1] Transcript of Record in Docket No. 19—October Term, 1938, page 1735.

and scope of the matters on which the Court below was asked to pass in first instance, without the aid of any investigation and findings by the Board. In the Court below, the Amalgamated stated its object to be to "procure enforcement rather than the recovery of money" (Amalgamated's Brief in the Circuit Court, page 3). The petitioner's standing to ask the relief sought (R. 13) was determined in the light of the petition, the nature of the matters on which the Court was asked for an adjudication, and the facts appearing[1]. A statement of these matters is appropriate.

Having made and entitled its petition in the same review and enforcement proceedings (R. 1) which were before this Court in 305 U. S. 197, Amalgamated gave the I B E W notice of its motion and also notified the Board and its Regional Attorney (R. 3-4). Its petition was in form and effect a motion for an adjudication that various matters specified be adjudicated as constituting contempt. This was

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[1] Petitioner's Brief (page 8) complains of the inclusion, in the Transcript of Record, of Mr. Carlisle's affidavit (R. 26-40), which is by many references an integral part of the respondents' answer (R. 14-25) to the Amalgamated's lengthy motion papers, which are printed at R. 3-13. The papers printed in the Transcript were those agreed upon and stipulated by counsel. Inasmuch as Mr. Carlisle's affidavit (R. 26-40) tends to clarify the legal issues as to the Amalgamated's standing as hereinafter appears, the affidavit was properly included in the Transcript. Petitioner's brief (page 7) refers to the omission, from the Transcript, of the notices of motion to dismiss, served respectively by the respondents and by the I B E W. These two motions were denied by the Court below on the ground that the matters submitted in support thereof should properly be asserted (as they were also) in opposition to the motion to punish for contempt (R. 68, 23-25). As the Court ruled that the Amalgamated has no standing to make the contempt application to which the motions related, naturally neither the respondents nor the I B E W have sought to review the denial of the motions to dismiss; and the Amalgamated has failed to do so. The grounds of the respondents' motion to dismiss are stated in their answer at pages 23-25. The Court below considered, and upheld as we see it, the grounds stated in Paragraphs XVII and XVIII of the answer.

sought in furtherance of enforcement of the Board's Order and claimed "special rights of the petitioner", "guaranteed under the Act" and as provided in the Orders of this Court (R. 13).

The matters alleged in the petition were properly related to the period after the entry of the enforcement decree of January 21, 1939, although some of the alleged incidents ante-dated that. They were in the nature of matters arising after this Court's decision and the final decree enforcing the Board's Order as modified, and in large part by virtue of this Court's decision as to the continuance of the I B E W Contracts in force (305 U. S. 197, 231-239). In the nature of things, such matters had not been litigated before the Board or in the Courts, and had not been the subjects of investigation and findings by the Board. As to at least the claimed insufficiency of the posting of notices, the Board had made a field investigation and had made no report of insufficiency (R. 31).

In form as well as avowed objective, the Amalgamated's motion and prayer (R. 13) were designed to secure an *adjudication* that various matters constituted civil contempt, and thus in effect to secure a supplemented and extended decree of enforcement covering matters on which the Board and the Courts had not passed, rather than to secure punishment or penalties. Specifically, the petition asked (1) that the respondent Companies, etc., be adjudged in contempt of the decree of the Circuit Court of Appeals "for having failed to comply with its decree dated March 21st, 1938, as amended by its decree dated January 21, 1939" (R. 13); and (2) that the Court "take such action as shall appear just, reasonable and necessary to make effective the Order of the National Labor Relations Board, as ordered to be enforced by this Court" (R. 13).

Although the petitioner's prayer for relief thus left it wholly and vaguely with the Court to shape the mode of

further enforcement "as shall appear just, reasonable and necessary" (R. 13), the Amalgamated stated to the Court below that its primary purpose in bringing the contempt proceeding was to obtain from the Court a further or more specific Order "(a) directing specifically the discontinuance of the privileges now extended I. B. E. W., or (b) directing the extension of these privileges to Amalgamated" (Amalgamated Brief in the Circuit Court, page 5). Indeed, the C I O preferred the latter course, on the ground that "in order to avoid future applications for punishment of further violations, the best, perhaps the only, way of remedying the situation is by specific direction of the extension of the same privileges to Amalgamated" (*Ibid*, page 5).

The acts alleged and complained of in the petition, and whatever affirmative action is specified in the present prayer for relief, thus vary substantially from both the Board's complaint which initiated the proceedings[1] and the relief granted by the Board's Order[2]. What the petitioner mainly seeks by its motion, aside from the advantage of an adjudication of contempt, is to obtain, without resort to the Board, a decree of Court enjoining or prohibiting various specific things which have arisen since the prior proceedings.

Neither the issues of fact thus raised, nor the proposed extensions and supplements of the Board's Order of November 10, 1937, have been passed upon by the Board as the body having primary jurisdiction of such matters. If these matters have been submitted by the C I O to the Board, the latter has not acted upon them, has not made findings of fact as to them, has not started any contempt proceeding, and in any event has not made any supplementary or modifying Order covering the matters

[1] Transcript in Docket No. 19—October Term, 1938, pages 12-15.
[2] See Appendix, pages 51-53.

complained of by the C I O, and has not asked the Court below to supplement or amend its decree of enforcement. In effect, the C I O thus claims standing and authority to invoke single-handed the Court's aid to supplement and extend the enforcement provisions of the decree entered upon the Board's application on January 21, 1939, and further claims the right to do this, not only on the basis of the C I O's own independent and unreviewed determination of subsequent and different facts, but also by a method of enforcement supported by no fact finding by the Board and no determination or Order by the Board.

Answer of the respondents

The respondent Companies answered the motion fully on the merits (R. 14-62), and among other things showed affirmatively (R. 22-23) that about 65 per cent of their eligible employees are members of the I B E W *with dues fully paid* (R. 28-29, 32-34, 58), which establishes the identity of the majority labor organization that under Section 9(a) has the right to speak and act for the employees in matters arising under the Act. Section 9(a) commands the employer to deal with the labor organization to which a majority of its employees belong; the same language has been held to impose the negative duty to deal with no other. The Board has itself held that an employer is under no duty to bargain with, or to deal with grievance committees of, a Union which does not constitute or represent a majority of the employees (*Mooresville Cotton Mills and Local 1221, U. T. W. A.*, II NLRB 952; *Matter of Williams Manufacturing Company*, VI NLRB 135). The Amalgamated's motion papers here make no claim of right to represent the majority of the employees. Its motion is thus by a small *minority* labor organization, and is in oblique attack on, and in derogation of, the Contracts, arbitration procedures, grievance committee adjustment of potential disputes, etc., which were sustained and commented on by this Court (305 U. S. 197, 231-238).

The answer showed that respondents have not violated Section 8(5) or Section 9(a) of the Act, and have followed the decision of this Court as to the Contracts in force with the majority labor organization. Acts done in obedience to Section 9(a) and pursuant to valid Contracts with the majority Union could not violate the Board's Order as modified. Further defenses were stated (R. 23-24), including a challenge of the standing of the Amalgamated, under the circumstances appearing, to make such an application to the Court as to an Order made by the Board pursuant to the Act and decreed, with certain modifications by this Court, to be enforced at the instance of the Board (R. 23). The respondents also filed affidavits (R. 26-62) which, with the documents attached as "exhibits", showed in detail the Companies' compliance with the decree of January 21, 1939, and with the Board's Order as so modified. The I B E W also appeared in the Court below and contested the standing of the Amalgamated to make and maintain, under the circumstances, the application denied by the Court below.

As the petitioner stipulated (R. 2) that it would bring up for review, and would rely on, only the question of its standing to institute such a contempt proceeding, the detailed affidavits which supported both the answer (R. 14-25) and Mr. Carlisle's answering affidavit (R. 26-62) were not offered by the petitioner for printing in the record here.[1]

Petitioner's moving papers do not state whether or not all or any of the matters alleged in its moving papers were in first instance submitted by it to the Board. In any event, the moving papers do not allege any investigation, findings, or decision by the Board thereon.

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[1] See footnote on page 8.

ARGUMENT

POINT I

The National Labor Relations Act does not give to a contending labor organization equal or greater powers than those of the Board, in the initiating and control of enforcement procedures

The unusual feature of this proceeding is that although the Board, acting under its statutory powers and after full hearings upon its own complaint, entered an Order against the respondents, upheld its Order in review and enforcement proceedings, and secured at its own sole request a decree for the enforcement of its Order, the petitioner here in proceedings for an adjudication of contempt and for a supplementing and extension of the Board's Order is not the administrative agency[1] but is one of the contending labor

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[1] Where the Board has found, upon investigation, that in its opinion contempt proceedings should be instituted because of non-compliance with decrees enforcing its Orders, the Board has instituted, and the Courts have entertained, such proceedings. See:

National Labor Relations Board v. *Bell Oil and Gas Company*, 98 Fed. (2nd) 405; rehearing denied 99 Fed. (2nd) 56 (C. C. A., 5th);

National Labor Relations Board v. *Hopwood Retinning Company*, 104 Fed. (2nd) 302, 303 (C. C. A., 2nd). Opinion shows that the Board's motion was supported by "affidavits • • • from officials and attorneys of the Board's Second Region located in New York, from officials of the Unions involved, and from twelve production employees, drivers and helpers," which indicates that the Board conducted an investigation as to violations of its Order *before* it went to Court with a contempt proceeding;

National Labor Relations Board v. *Eavenson and Levering Company*, (C. C. A., 3rd), not yet officially reported; 4 L. R. R. 973;

National Labor Relations Board v. *Carlisle Lumber Company* (C. C. A., 9th), not yet officially reported; 5 L. R. R. 440;

National Labor Relations Board v. *Pacific Greyhound Lines*, 106 Fed. (2nd) 867 (C. C. A., 9th).

organizations. The governmental body having been the moving agency in the prevention proceedings hitherto had, a private labor organization now not only takes the initiative into its own hands but argues here that its own right is clear while the Board's right to move would be at least doubtful (Brief, page 21).

Respondents' contention is that the Act primarily protects the public right to commerce unobstructed by labor controversies, and in so doing provides the procedures whereby disputes due to denial of the rights of employees can be prevented from endangering industrial peace; that the initiative and control of all prevention and enforcement procedures have been placed in the hands of the administrative agency[1], not in any private hands; and that the Act, having been enacted and upheld on the ground that it vests in the Board the authority to prevent labor disputes which may endanger the public right, should not now be construed to place that authority solely or equally in private hands.

Theory of the Amalgamated's claim

For certainty that the petitioner's claim of paramount rights by virtue of the Act is not misstated, we bring together the following quotations[2] from its brief:

> "The National Labor Relations Act creates private rights" (Brief, page 17).
>
> "* * * the Act was designed *to confer rights upon individuals and associations*" (page 13).

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[1] The standing of a Federal agency to utilize the procedure of a civil contempt was upheld in *McCrone* v. *United States*, 307 U. S. 61. See, also, footnote on page 13, *ante*.

[2] The *italics* shown in the following quotations from the petitioner's brief are in the original.

"* * * unfair labor practices are not 'unlawful',— *they are merely infringements of the private rights created by the Act*" (page 17).

"* * * there is no duty imposed by the Act upon the National Labor Relations Board, except the ordinary duty, imposed on all Courts, to act judicially when it does act. * * * the National Labor Relations Board was intended to be an industrial court of first instance" (pages 21-22).

"* * * the National Labor Relations Act does not define any public wrongs * * *. There are no Public Wrongs defined in the Act * * *" (page 22).

"* * * those whose rights have been found to have been invaded and for whose benefit the remedies have been prescribed, have rights which they may assert in Court *in propria persona,* and without the intervention of the National Labor Relations Board" (page 13).

"* * * while the rights are those of individuals, *their enforcement and exercise* is clearly placed in the hands of labor organizations" (page 18).

"The right of Congress to legislate on the subject is due entirely to the fact that the *private grievances* of certain individuals and groups in a matter in itself not subject to Federal regulation has been found to habitually lead to certain *action on the part of those individuals and groups* * * *" (page 14).

"In fact, we doubt very much whether the National Labor Relations Board has the power to protect the Petitioner's rights by a motion to punish for a *civil* contempt" (Brief, page 21).

We have brought together and quoted the petitioner's basic contentions at some length, for the reason that they seem to us virtually to answer themselves, under the decisions of this Court, the language of the Act, and the Reports which accompanied its enactment in the Congress.

Petitioner answered by its own previous contentions

But first they may be answered from the brief of the same Amalgamated, by the same counsel, before this Court in *Consolidated Edison Company* v. *National Labor Relations Board* (305 U. S. 197). Counsel for the Amalgamated there argued that the purpose and effect of the Act were to transfer "the entire problem of employer-employee relationship into the domain of public law" (Brief in that case, page 99), and that

> "one of the basic principles established [by the Act] is that collective bargaining on behalf of employees is not a private right, to be acquired by contract with an employer, but a public office to be conferred by the employees" (*Ibid*, page 99).

The Amalgamated then took the position before this Court that even *contractual* rights acquired through collective bargaining are of a public rather than a private nature under the provisions of the Act, and are therefore subject to the "supervision of the public authority charged with the enforcement of the Act" (*Ibid*, page 100).

The Act declares public policy and fortifies public rights

The right of employees to organize themselves and to bargain collectively through representatives of their own free choice does not date from the enactment of the Act in 1935 and was not created by the Act. Its protection has long been regarded as in the public interest, and not merely a concern of particular employees and labor organizations involved. In any event, it had been recognized by the Courts as a fundamental right of wage workers, prior to and independently of the Act. *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 33.

The Act recognized these rights and provided ways and means of their protection and enforcement by public authority. In so doing, the Act declared it "to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce," etc. (Section 1); the Act stated in detail the public interests found to have been affected adversely by labor disputes, strikes, etc. (Section 1); the Act brought the Federal government into action to eliminate specified causes of industrial strife which burden commerce and were said to be due to inequality of bargaining power between employers and employees (Section 1).

Undoubtedly, an effect of all this was intended to be, through Board action, greater security for the rights of employees and organizations of employees; but these incidental private advantages were subordinate to the public purpose. The Act enumerated, and to some extent defined, various practices, by employers, which were found injurious to the public right to unobstructed commerce; and the Act set up an administrative agency and provided enforcement and review procedures in the Courts, for the prevention and punishment of such offenses. The question here is *not* as to the nature of the employees' right to self-organization and collective bargaining independently of statute, but whether the function of protecting commerce from the practices condemned by the Act is vested in the administrative agency or, as claimed by the Amalgamated, is vested in the Amalgamated, equally with the Board or to the exclusion of the Board.

Grounds on which the Act has been upheld

The Amalgamated's present contentions disregard and endanger the grounds on which the validity and application of the Act have been upheld by this Court. The Board's power to prevent and redress unfair labor practices affecting commerce was upheld in the *Jones & Laughlin* case and

subsequent decisions, on the ground that the Congress had found that the proscribed acts directly burdened and obstructed interstate commerce or its free flow. It is only when and where labor controversies may lead to strife which in turn may obstruct that commerce, that the Congress has empowered the Board to act to protect that commerce, even when the employer, the employees, and the enterprise, are intra-state and local (*Consolidated Edison Company* v. *National Labor Relations Board*, 305 U. S. 197, 220-221; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601).

The petitioner at one point concedes that the power of the Congress to legislate against unfair labor practices does not flow, as in the case of the Interstate Commerce Act, from a constitutional grant of power to legislate directly on the subject, but is derived from an indirect concern with the effects upon commerce of the industrial practices sought to be prevented (Brief, page 14). The public interest and right as to interstate commerce unobstructed from any of the specified causes or sources are thus paramount and are the chief concern of the Act; and the protection and advantages thereby afforded to private persons and labor organizations are incidents which do not give rise to procedural rights or place private labor organizations in the stead of the Board, or on a parity with it, as the enforcement agency.

Remedies and procedures are inter-dependent

The Act provides within its text a comprehensive plan for investigation, fact-finding, prevention and enforcement. Plenary powers of investigation are conferred on the Board (Section 11). The Board is empowered "to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce" (Section 10(a)). Unfair labor practices may be brought to the attention of the Board (Sections 8, 10(b)). Proceedings as to unfair

labor practices are only upon the Board's own complaint (Section 10(b)). An interested person or labor organization who may be adversely affected by the Board's action may be permitted to intervene and be heard by and before the Board (Section 10(b)). If the Board is of the opinion, as a result of proceedings, that the person complained of has engaged in an unfair labor practice, the Board is directed to issue an Order directing such person to desist from such practices and commanding such appropriate affirmative action "as will effectuate the policies of this Act" (Section 10(c)). The right of the majority labor organization to speak and act for all of the employees may, when denied or questioned by an employer, be democratically established, through electoral processes conducted by the Board (Sections 8(5) and 9). As to a determination by the Board in the form of an Order, the Board may petition the appropriate Court "for the enforcement of such Order" (Section 10(e)). A person or labor organization "*aggrieved*" by a Board decision and Order may petition the Court for review (Section 10(f)).

Orders of the Board become effective only upon the granting of a decree of enforcement by the appropriate Court at the instance of the Board (Section 10 (e)). The authority of the Court to grant enforcement under the Act is closely tied to the Board's initiative. Precedent conditions to a judicial decree of enforcement in the field of labor relations are a complaint by the Board, fair and full hearings before the Board, findings of fact by the Board, an Order by the Board, a petition by the Board to the Court for enforcement, the entry of the decree at the Board's request. At each step, the initiative and control of the prevention and enforcement proceedings rest with the Board; only in the case of a person "aggrieved" by a Board Order is an initiative as to an application to the Court necessarily placed in private hands; e. g., the right of anyone aggrieved *by the Order* to petition for *review* of the Order.

The Act and the Order of the Board, rather than the decree of the Court, determine and impose the duties of the respondent employers, inasmuch as it is the Board which makes the directions which it finds to be appropriate to "effectuate the policies of this Act."[1] The statute provides for a stay during review proceedings, on proper showing; and under the Act the decreed enforcement is akin to the affirmance of an administrative determination.

The initiative and discretion as to proceedings, and the fact-findings as to what action will effectuate the policies of the Act, having been vested in the Board, it should be noted that as to the supplements, extensions, modifications and interpretations which the Amalgamated here claims standing to ask the Court to make as to the Board's Order in the light of subsequently arising circumstances and conditions, there have been no complaint, hearings, fact-findings, decision or Order, by the Board (see pages 9 to 11, *ante*).

The Act expressly makes its procedures exclusive

Section 10 of the Act is entitled "Prevention of Unfair Labor Practices". It contains in subdivisions (b) to (i), both inclusive, all of the provisions for the prevention of such practices and for the enforcement and review of the Board's Orders. But Section 10 *first provides*, in subdivision (a), that—

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

We submit that this provision could hardly have been made more sweeping or more conclusive. It is also in accord with familiar law. As the concept of "unfair labor prac-

[1] The purpose of an enforcement proceeding is to obtain obedience to the Board's Order. The Board may petition to that end "if an Order of the Board is disobeyed." Senate Report No. 573; 74th Congress, 1st Session; page 15.

ices" is statutory, those who seek to advantage themselves y obtaining their prevention or punishment must follow the tatutory procedure therefor. *Lewis' Sutherland on Statutory Construction* [2nd Ed.], Sections 491-493. In seeking to nforce what the petitioner here states to be "statutory ights" (Brief, page 3), the remedies and procedures provided by the statute must be followed (*Blankenship* v. *Kurfman*, 96 Fed. [2d] 450, 454). The Congress generally conorms and limits the procedures according to whatever may e the "statutory rights" under the particular law. Thus he Congress, having given to shippers a private right to eparations under the Interstate Commerce Act, provided lso for a private independent action to enforce that right 49 U. S. C. A., §§ 9, 13, 16). On the other hand, as the 'ederal Trade Commission Act defines and proscribes "unair trade practices" which are injurious to public interests, ut creates no private rights apart from the public rights rotected through procedure before and by the Commission, hat procedure is not a private means of enforcing private ights but is held to be a public procedure looking only to ublic ends (*Federal Trade Commission* v. *Klesner*, 280 J. S. 19, 25).

ntent of the Congress was plainly stated

The Congress made it clear that, by adapting from the 'ederal Trade Commission Act the concept of "unfair ractices" and making the remedies and procedures under he National Labor Relations Act analogous to those under he Federal Trade Commission Act, there was no intention hat the Wagner Act should create private rights of action r compel the new administrative agency to share or yield s powers to those of contending labor organizations. ll this was specifically stated in the Congressional Reports ccompanying the Wagner bill. The Report of the House 'ommittee on Labor stated:[1]

> "The Board is empowered, according to the procedure provided in Section 10, to prevent any person

[1] House Report No. 972; 74th Congress, 1st Session, page 21.

from engaging in any unfair labor practice listed in Section 8 'affecting commerce', as that term is defined in Section 2 (7). This power is vested exclusively in the Board and is not to be affected by any other means of adjustment or prevention. The Board is thus made the paramount agency for dealing with the unfair labor practices described in the bill.

"The procedure provided is analogous to that in the Federal Trade Commission Act (Sec. 5) and is familiar to all students of administrative law. * * *"

It will be noted that Section 10(a) of the Act quoted (quoted on page 20, *ante*) is in almost the language of the first paragraph above set out from the House Report. After outlining also the relief which Board Orders may include by way of affirmative action, the House Report said:[1]

"* * * No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint. The form of injunctive and affirmative order is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by law declared to be detrimental to the public weal."

In describing the purpose of Section 10(a), the Senate Committee on Education and Labor said, in its Report:[2]

"Section 10 (a) gives the National Labor Relations Board exclusive jurisdiction to prevent and redress unfair labor practices, and taken in conjunction with Section 14, establishes clearly that this bill is paramount over other laws that might touch upon similar subject matters. Thus it is intended to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American Law regarding collective bargaining."

[1] House Report No. 972; 74th Congress, 1st Session, page 21.

[2] Senate Report No. 573; 74th Congress, 1st Session, page 15.

The foregoing excerpts from the Reports in the Con-ess should be decisive. The Courts will be guided strongly such evidences of the legislative intent, and will not read to the Act provisions which are not there and are, as re, expressly negatived.

American Federation of Labor v. *National Labor Relations Board*, — U. S. —; decided January 2, 1940.

Full consideration of the Congressional declarations and e provisions of the Act leads alike to the conclusion that ere is "no provision in the Act which can be construed as tending to create rights for employees which can be en-rced in Federal Courts independently of action by the ational Labor Relations Board".

Blankenship v. *Kurfman*, 96 Fed. (2d) 450, 454.

ocedure analogous to that under Federal Trade Commission Act

The petitioner seeks to differentiate between the pro-sions of the Federal Trade Commission Act and the Na-onal Labor Relations Act on the ground that the former concerned with public wrongs and was not designed for e protection of individuals and groups who are affected the unfair trade practices (Brief, pages 13-16). Con-ding that the procedure under the Federal Trade Commis-on Act is designed solely to safeguard public rights (Brief, ge 28), the Amalgamated argues that procedures provided the two statutes are not analogous.

The Congressional declaration that no private right of ion was contemplated by the Wagner Act and that the ocedures provided in that Act are analogous to those pro-led in the Federal Trade Commission Act seems to us leave no ground for doubt as to the primarily public aracter of the rights protected by the Wagner Act and of procedures, through which those rights are to be safe-

guarded by the initiative and the preventive measures of the Board. The Congressional declarations are decisive against the petitioner's contention that the Act was intended to assimilate its procedure to that provided in the Interstate Commerce Act rather than to that provided in the Federal Trade Commission Act. The contemporary Reports in the Congress show clearly that Congress has not only carried over the concept of "unfair trade practices" into the field of "unfair labor practices" but also intentionally appropriated the procedure under the Federal Trade Commission Act and did so for the reason that the procedure so adopted was, except where otherwise expressly limited, deemed to be appropriately designed to protect primarily public rights.

Petitioner's argument as to other statutes

Apart from the legislative declaration, an examination of the procedure provided in the Act will be found, on examination, to be like that provided in the Federal Trade Commission Act and wholly unlike that provided in the Interstate Commerce Act. As appears from a comparison of the quoted passages from the Report of the House Committee on Labor (H. R. Rep. No. 972, *supra*) and the opinion in the *Klesner* case, *supra*, the procedure under both Acts requires that a formal complaint be brought in the name of the Commission or Board, and that the prosecution be wholly that of the government, which bears the entire expense of the prosecution. Neither Act gives the person aggrieved by an unfair labor practice or unfair method of competition a right to institute before the Board or Commission a complaint against the wrongdoer. Such a person may file a charge of wrongdoing and request that action be taken. But it is for the Board or Commission to say whether a complaint shall issue or that a prosecution follow. The denial of the request is final. Mandamus or other process of the Courts will not lie to compel it to proceed.

If the request for action is granted, the purpose of the proceeding is for the protection of the public. The protection afforded to the person filing a charge or request for action is an incident. The person making the request or charge does not become the complainant in the proceeding or obtain any control over it. As shown at page 5, *ante*, the Amalgamated was not allowed by the Board to take part in the examination of witnesses at the hearings, nor was it able to argue or file a brief in the enforcement proceedings without obtaining special permission to do so from the Circuit Court (see pages 6 and 7, *ante*).

The fact that the Amalgamated would be *benefited* by a present supplementing, extension, interpretation, or "further enforcement", of the Board's Order does not give the Amalgamated equal or exclusive right to initiate steps in Court to bring that about, without proper proceedings and petition by the Board. This Court has held, with respect to Section 5 of the Federal Trade Commission Act, that it "does not provide private persons with an administrative remedy for private wrongs", notwithstanding that the Act was intended to prevent proscribed unfair trade practices which, along with the violation of the public interest, also directly injure private persons in their business.

Federal Trade Commission v. *Klesner*, 280 U. S. 19, 25.

National Labor Relations Act unlike Interstate Commerce Act

Petitioner argues that the National Labor Relations Act should be construed with a view to providing private procedures for the redress of private grievances, as under the Interstate Commerce Act. It is argued that the purpose of the National Labor Relations Act is "exactly like that of the Interstate Commerce Act, which was designed to prevent certain industrial practices" that bring direct injury to groups and individuals (Brief, pages 14-15).

The concepts and procedures under the Interstate Commerce Act are wholly unlike those of the National Labor Relations Act. The former creates a private administrative and judicial remedy, e. g., any interested person deeming himself aggrieved may file and prosecute a complaint *as of right*, at his own expense; and the carrier is required to answer, all as in civil judicial proceedings (Section 13 (1); see *Federal Trade Commission* v. *Klesner, supra*). An individual shipper is given the right to reparation, and procedure is expressly provided for a suit by the shipper in Court to enforce an Order of the Commission for reparation (Sections 9, 13, and 16).

Petitioner points to the provisions of Section 9 of the Commerce Act as granting alternative remedies, one before the Board and the other before the Court. In construing Section 9 in *Pennsylvania Railroad Company* v. *Puritan Coal Mining Company*, 237 U. S. 121, 128, this Court said:

> "It will be seen that this Section does more than create a right and designate the Court in which it is to be enforced. It gives the shipper the option to proceed before the Commission or in the Federal Courts. The express grant of the right of choice between those two remedies was the exclusion of any other remedy in a State Court; * * *"[1]

The provisions of Section 9, when considered in the light of Sections 13 (1), and 16 (2), (4), (12), have this further significance and pertinence to the point at issue, viz., they clearly indicate that when a statute deals with matters of public concern which are placed in the keeping of an administrative agency and the Congress intends to confer also private rights, it provides also, expressly and clearly, an appropriate procedure therefor, with an opportunity

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[1] To avoid giving the Federal Courts exclusive jurisdiction, a proviso preserving common law remedies was added to Section 22 (237 U. S. 121, 129).

to proceed and be heard as of right and to institute suit independently of and without the authority of the administrative agency.

The National Labor Relations Act is plainly different. As we have shown on pages 18 to 20, *ante*, no one but the Board is made the final arbiter as to when a complaint should be filed, hearings had, findings made, an Order issued, enforcement applied for, etc. There can be no merit in petitioner's belief (Brief, page 21) that a civil contempt proceeding could not be brought by the Board[1], but only by a private party "whose rights have been involved."

Incidental private benefits do not confer standing to sue

But even under the Interstate Commerce Act, a distinction is recognized between shippers whose independent rights are violated and those whose interest or advantage claimed to be violated is merely an incident of, and dependent upon, the rights of others. This distinction found application in a case involving the Commission's failure to suspend a new rate structure and thereby to re-establish lower rates enjoyed under the superseded tariff. *Sprunt and Son* v. *United States*, 281 U. S. 249. It was there held that the facts did not show violation of any independent right of a shipper and so did not give him sufficient status to maintain an independent suit, inasmuch as his advantage is merely "an incident of, and hence was dependent upon,

[1] See footnote on page 13, *ante*, listing many instances where the Board found, upon investigation, that in its opinion contempt proceedings should be instituted because of non-compliance with decrees enforcing its Orders; and the Board has instituted, and the Courts have entertained, such proceedings. The standing of a Federal agency to utilize the procedure of a civil contempt was upheld in *McCrone* v. *United States*, 307 U. S. 61.

the right, if any, of the carriers to maintain that tariff in force" (*Ibid,* pages 254-258).[1]

Here the Board's findings and Order were made, and the Court's enforcement decree was entered at the request of the Board, to the end of fulfilling the Board's primarily public function of preventing and redressing unfair labor practices "affecting commerce." The Amalgamated does not show or claim any interest in "commerce" that is personal to itself or its members. The advantages which the Amalgamated or any other labor organization may enjoy thereunder are an incident of, and hence are dependent upon, the authority and direction of the Board to take such steps as it may deem to be appropriate, to the end that its Order may be enforced primarily for the protection of the public. No private right of the Amalgamated has been violated, for the Congress made it clear that the Act would confer no private rights.[2] Even if the procedure expressly set out in the Interstate Commerce Act were read into the National Labor Relations Act by implication (for which there would be no warrant under the most recent rulings of this Court), the *Sprunt* case indicates that the Amalgamated would still have here no legal right or sufficient status to initiate any step of enforcement independently of and without the authority of the Board.

Rulings in the various Circuits

There has been no lack of uniformity in the decisions, in the various Circuits, as to nature of the rights and procedures created by the Act and as to claims of right of private persons or labor organizations to take the initiative in Court to enforce benefits they would gain under the Act.

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[1] It thus appears that when action by the Interstate Commerce Commission is for the protection of public interests, and the protection thereby afforded to private persons is the incident, that interest alone does not give him the right to maintain an independent suit. Cf. *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, 27.

[2] See page 20, *ante.*

The ruling in the Second Circuit is not solitary or at variance. The Fifth, Sixth, Seventh and Ninth Circuits have held the procedure provided by the Act is not and cannot be "made a private one to enforce a private right. It is a public procedure, looking only to public ends."

Agwilines, Inc. v. *National Labor Relations Board*, 87 Fed. (2d) 146, 150 (C. C. A. 5th);
National Labor Relations Board v. *Colten, et al.*,[1] 105 Fed. (2d) 179 (C. C. A. 6th);
Blankenship v. *Kurfman*, 96 Fed. (2d) 450, 454 (C. C. A. 7th);
National Labor Relations Board v. *Hearst*, 102 Fed. (2d) 658, 664 (C. C. A. 9th);
National Labor Relations Board v. *Carlisle Lumber Company*, 99 Fed. (2d) 533, 537 (C. C. A. 9th).

POINT II

To uphold the claim of a contending labor organization to equal or superior proctorship of proceedings to enforce the Board's Orders would subvert the Act and its administration

The Act is relatively new legislation in a complex and difficult field. Its administration is likely to be perfected by experience; its procedures as well as substantive provisions are likely to be improved by amendments suggested

[1] In this case the employer contended that the affirmative provisions of the Board's Order, which required him to reinstate with back pay a discharged employee, were invalid by reason of the dissolution of the partnership terminated by the death of one of the partners and the consequent termination of the employer-employee relationship. In overruling this contention, as to the effect of other principles of law upon the Act, the Court held that (page 182):

"This contention, however, ignores the essential nature of regulatory statutes of the class here considered, and the scope and purpose of administrative orders made in exercise of powers conferred by such legislation. They are to implement a public social or economic policy not primarily concerned with private rights, and through remedies not only unknown to the common law but often in derogation of it."

by experience. Contentions that the Act should be made to provide remedies and procedures admittedly not explicit in its text should be addressed to the Congress, not to this Court.

American Federation of Labor v. *National Labor Relations Board*, U. S. ; decided January 2, 1940.

Inherent in such a statute is the concept that in theory at least, the administrative agency is, or in due course will become, somewhat of an expert or technician, more familiar than others with the problems involved and with the exigencies of the particular situations at hand, and inclined to shape and time its action according to a long-range plan for effectuating the policies of the statute.[1] With such an agency, disinterestedness as well as impartiality come to be presumed, and the exigencies of particular demands and pressures tend to be withstood. No reason yet appears for expecting the operation of different trends as to the National Labor Relations Act and its administration.

In the motion here under consideration, it was sought to call the respondents to the bar of the Court below in answer for alleged contempt; and this was done, not by a governmental agency sworn to carry out fairly and in good faith the intent and provisions of the mandate of the Congress, but by a rival Union which has been and is in bitter contest with the Union which has as its members a large

[1] The comment of Professor Calvert Magruder (now United States Circuit Judge in the First Circuit), in 50 Harv. Law Rev. 1071, "Development of Collective Bargaining", is pertinent here. He pointed out (at pages 1090-91) that the Congress did not adopt for the National Labor Relations Act enforcement provisions like those set out in the Railway Labor Act, under which the representative of the aggrieved employees must apply to the Department of Justice or bring a bill in equity to compel observance of the law. Professor Magruder stated that the Congress "apparently thought that more effective enforcement would result from entrusting it to an expert administrative agency which would 'provide specialized treatment of the factual aspects of a specialized type of controversy' ".

d indisputable majority of the respondents' eligible em-
oyees (R. 28-29, 58). The question here is whether this
urt, in the absence of express provisions in the Act, and
the face of the stated intent of the Congress to omit
h provisions, should give the proctorship over enforce-
nt proceedings to a private, biased, and specially inter-
ed labor organization, to aid it in its warfare on the
jority Union and its rights under Section 9(a) of the Act.
ch a bestowal, in derogation of the orderly functioning of
administrative agency, could only have disastrous effects
the long run.

The question is not merely whether the C I O shall be
rmitted here to "by-pass" the Board and achieve a stand-
superior or equal to that of the Board. The adminis-
tive process of investigation and fact-finding is also to
"by-passed", and such matters are to be brought to
urt solely on the basis of the C I O's biased and *ex parte*
ions of its own interests. The Court is to pass on mat-
s on which the Board has not made findings; the Court
to be denied the aid and benefit of investigation, find-
s, and petition by the Board. Any such procedure would
contrary to the administrative process and would sub-
t the intended procedures of the Act.

Likewise, the petition of the C I O is based on a selfish,
ound, and inherently dangerous point of view as to the
and the determinations which are made under it. The
ard's complaint and hearings upon notice, the Board's
lings and Order, the Board's enforcement proceedings
the decree entered at its request, in all of which the
O now asserts proprietary and pre-emptive rights, are
ts of a *legislative process*. They derive validity only
n a constitutional delegation of authority by the Con-
ss. A valid Order of the Board as to private industry,
y granted enforcement at the instance of the public
ncy, is essentially a public enactment, not special legis-
on for the private benefit of any particular organization
ersons.

Investigation by the Board should precede contempt proceedings

From the settled law and practice under like statutes, we note the essentials of the sound procedure where disobedience of an Order of an administrative agency is charged. In analogous situations arising under Section 5 of the Federal Trade Commission Act, the Courts have required first a consideration and determination by the Commission of questions raised as to non-compliance with its Orders and of the propriety of extension or modification of the enforcement provisions. This has been required where the Commission itself brought the contempt proceeding.

In *Federal Trade Commission* v. *Milling Company*, 288 U. S. 212, this Court referred back to the Commission the question whether its Order should be modified in a manner not previously considered and determined by the Commission, and did so on the ground that "This is a matter which the Commission has not considered but which, as the body having primary jurisdiction, it should, in the first instance, consider and determine."

In *Federal Trade Commission* v. *Baltimore Paint & Color Works, Inc.*, 41 Fed. (2d) 474, the Circuit Court, following the ruling in *Federal Trade Commission* v. *Balme*, 23 Fed. (2d) 615, referred the questions of the violation of the Order, the enforcement of which was asked in the petition, to the Federal Trade Commission to report its conclusions to the Court. This was done on the ground that (page 476):

> "This Court has no machinery for investigating or ascertaining the fact as to the compliance or noncompliance with an Order of the Commission. The Commission has such machinery and is the proper body to pass upon that question."

The facts here seem to us to make even a stronger case for the Court's refusal to consider and determine in first instance the questions of disobedience and of supplementing and extending the Order and decree. Here a private person, not the Board, takes the matter to Court in first instance,

and does this, so far as its own showing goes, without even asking the Board itself to take steps to prevent and redress any of the alleged acts of disobedience to the Board's Order. In the Federal Trade Commission cases, the Commission had already considered and determined the disputed facts and the measures of enforcement to be taken. Here, as we have made clear at pages 3, 9 and 10, *ante*, the Amalgamated seeks supplemental and new extensions of enforcement, based on subsequently arising facts. The Court below could not have decided such issues of compliance or disobedience on affidavits.[1] Here, as in the Federal Trade Commission cases, the administrative agency has the machinery for investigating and deciding the factual issue, while the Circuit Court has no such machinery. Submission to the Court for its determination in first instance as to new and supplemental measures of enforcement would deprive the Court of the benefit of the findings and judgment of the Board.

Statutory requirements as well as the practice followed by the Courts in similar situations lead us to the conclusion that the Act and the Board can best fulfill their function of safeguarding the public against practices deemed unfair under the Act if it is required that all charges of non-compliance or disobedience of the Board's Order shall emanate from the Board, or shall be investigated and passed on in first instance by the Board, as the body having primary jurisdiction and the necessary administrative organization. To develop a precedent for a different course would frustrate the legislative policy which led the Congress to confer upon the Board exclusive powers of enforcement. The Board would cease to be the single administrative authority which the Congress intended to set out in the field of labor relations, and confusion rather than harmonious enforcement would result from the consequent dispersion of authority.

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[1] As Judge Amidon observed in *Great Northern Ry Co. v. Brosseau*, 286 Fed. 414, 416, with respect to use of affidavits in litigation involving labor disputes: "Experience * * * has caused me to be so incredulous of affidavits that I have required in all important matters the presence of the chief witnesses upon each side at the hearing."

Punishment for civil contempt of judicial process should be used sparingly and with great caution and deliberation (*Fox* v. *Capital Company*, 96 Fed. (2d) 684). Where, as here, the paramount public interest is to be protected and vindicated, the initiative in all enforcement should consistently be that of the public agency, not of a contending labor organization.

The Board's "response" to the C I O motion

Petitioner attempts to gain some support for its position here, by citing the "response" filed by the Board's counsel (R. 62-63), wherein he states that the Board deems that sufficient facts had been presented to warrant investigation, and offered its cooperation in this respect (Brief, pages 39-40).

The Board's counsel does not state whether the Amalgamated had submitted all or some of the same facts to the Board, and whether the Board had failed or refused to take action thereon. He does not state that the Board has found, or is of the opinion, that the unfair practices complained of come within the purview of its Order[1], or that it approves of the affirmative relief demanded by the petitioner, or that it has decided that the relief demanded or the prosecution of civil contempt proceedings at this time would "effectuate the policies of this Act," all of which are questions which subdivisions (a) and (c) of Section 10 and the express Congressional declarations[2], as well as the "primary jurisdiction" concept, place originally within the Board's exclusive jurisdiction.

The Amalgamated could not acquire standing by this "response"; the Board could not delegate to the Amalgamated its own power and authority under the Act. The Board was not made a party to the contempt proceeding

[1] The determination of what is an "unfair labor practice" seems to us to require knowledge as specialized as that involved in determining what is a reasonable rate.

[2] See pages 21-23, *ante*, and 42-43, *post*.

by the Amalgamated, and the Board did not ask leave to intervene as a party to the proceeding, after notice was served on it, so that it could prosecute in its own name, although the practice of the Board has been to initiate and prosecute civil contempt proceedings in its own name.[1]

All that the Board mildly stated in aid of the C I O was to the effect that matters had been presented which seemed to it to warrant investigation. We respectfully submit that the orderly course requires such an investigation by the Board and should be made before rather than *after* a contempt proceeding has been commenced, so that the Board could determine for itself whether the proceeding should be brought on at all. This would be in appropriate accord with the procedure regularly followed by it as to contempt proceedings[1] as well as complaints by labor organizations.[2]

Statistics published as to the work of the Board indicate that many of the complaints by labor organizations as to violations of the Act were found upon investigation to

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[1] See footnote, page 13.

[2] In an address at Duke University on December 3, 1938 (3 L. R. R. M. 1044), Mr. Charles Fahy, General Counsel for the Board, outlined the course followed:

> "The Regional Director on receipt of the charge dockets it. He may investigate the matter personally or he may assign it to a field examiner. The stories of the Union and the employees are obtained. The story of the employer is obtained. A complete investigation is made, including the facts as to jurisdiction. This preliminary investigation both as to jurisdiction and the alleged unlawful practices, precedes any formal proceedings.
>
> "The Director has simply received a charge which he is investigating. During this stage 42 per cent of all our cases are dismissed or withdrawn either as a result of the Regional Office finding that the charge is so lacking in merit as not to warrant further proceedings, or because jurisdiction is believed to be lacking. The charge is either dismissed or, on the advice of the Regional Director to the charging party that he will proceed no further, is withdrawn. If, however, the investigation leads the Regional Director to believe that the charge is well founded, he seeks compliance."

be "so lacking in merit as not to warrant further proceedings". Although we do not know what the Board's experience has been with respect to complaints respecting violations of enforcement decrees obtained by the Board, undoubtedly it must have found upon investigation that many charges of disobedience of the Board's Orders were so lacking in merit as not to warrant further proceedings.

The contention that the Board is without power to make such a preliminary investigation is groundless. Under Section 5 of the Act, it may "prosecute any inquiry necessary to its functions." Also, the matters complained of in the petition (R. 9-12) come within the investigatory powers of the Board under Section 10 of the Act. As a party litigant the Board would also have authority to investigate the claims made in affidavits submitted by the Amalgamated, and thus determine whether the facts warrant contempt proceedings. That the Board exercises such power is made evident by the numerous civil contempt proceedings which the Board has already instituted.

POINT III

Amalgamated's filing of a charge with the Board and its subsequent brief and oral argument by permission of the Court in the enforcement proceedings begun by the Board do not give it standing to institute contempt proceedings.

Amalgamated also claims standing here because: (1) The complaint issued by the Board originated in a charge filed by a predecessor of the Amalgamated; and (2) Its predecessor "intervened" in the enforcement proceeding instituted by the Board under Section 10 (e).

The filing of a charge does not make the labor organization the complainant or prosecutor in such proceeding as the Board decides to initiate, does not give it initiative,

control or standing as of right at any subsequent stage, and does not constitute the labor organization the party by whom the Board's Order and its enforcement are "secured". The provisions of Section 10 of the Act follow closely those of Section 5 of the Federal Trade Commission Act (H. R. Rep. 972, *supra*); *Ford Motor Company* v. *Labor Board*, 305 U. S. 364, 373; *Labor Board* v. *National Motor Bearing Company*, 105 Fed. (2d) 652, 661; and with respect to the standing, under Section 5 of the latter Act, of a person or organization who brings charges of unfair practices to the attention of the Commission, this Court has said (*Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 25):

> "* * * A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it."

The National Labor Relations Act provides merely that "whenever" a charge of unfair labor practices is filed with the Board, the Board "shall have power" to issue a complaint in its own name and start a proceeding at its own expense (Section 10 (b)). As we have shown in detail on pages 5 to 7, *ante*, the Amalgamated's predecessor was denied any part in the taking of testimony[1], the Board exercised control of the proceedings at every stage, and enforcement was decreed solely at the request of the Board. The Amalgamated relies also upon the permission granted by the Court to its counsel to be heard orally and file a brief as though this established its standing as a formal party. The application was not of right, and was addressed to the

[1] This refutes the contention (Petition for Certiorari, page 24) that the Board itself recognizes the right and standing of a person who files a "charge" to prosecute the "charge" before it.

favor of the Court (see pages 6 and 7, *ante*). Leave to file a brief and be heard orally was all the Court granted, and was also all it could have granted to the Amalgamated, in view of the limitations imposed by sub-divisions (a), (e) and (f) of Section 10 of the Act.[1]

POINT IV

The Amalgamated cannot claim standing to prosecute this contempt proceeding on the theory that it is now a "person aggrieved" within the meaning of Section 10 (f) of the Act

Petitioner contends also (Petition, pages 23-24; Brief, pages 25-26) that Section 10 (f) gives to a person who files with the Board a charge of unfair labor practices a standing later as a party, in the event the redress asked for by him has been denied by the Board. From this the conclusion is attempted that within the meaning of Section 10 (f) the Amalgamated has standing as a "person aggrieved" to press a charge of civil contempt independently of any action by the Board.

Such a contention is without merit. Section 10 (f) can be availed of only by a person or organization aggrieved *by an Order of the Board*, and then only for the sole purpose of petitioning that the Order be vacated or modified. Such is not the nature of a civil contempt proceeding. Such a proceeding is merely a continuance of the earlier review and enforcement proceeding (*Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444-445; *National Labor Relations Board* v. *Hopwood Retinning Company*,

[1] The lack of standing of a labor organization as a party (where not aggrieved by the Board Order) seems implicit in the denial by this Court of the motion of the Maritime Union of America, upon whose charge the Board had issued a complaint alleging unfair labor practices (103 Fed. (2d) 157), for leave to intervene in *National Labor Relations Board* v. *Waterman Steamship Corporation*, 84 L. Ed. (Adv. Ops.) 132.

104 Fed. (2d) 302, 305). It was so treated and entitled by the Amalgamated (R. 1). Amalgamated has never claimed to be *"aggrieved"* by the Board's Order or the Court's decree. Its present purpose is to obtain an adjudication supplementing, extending and interpreting the Order and the decree. This was indicated by the Amalgamated in its motion (R. 13) and more particularly in the memorandum filed in support of its motion (Amalgamated brief in the Circuit Court, page 5). The relief which the Amalgamated asked of the Board was that it issue a complaint against the respondents. The Board issued a complaint, held hearings, and subsequently petitioned the Court for the enforcement of its Order. The record does not show a submission to the Board, or any denial by it, of any request by the Amalgamated that the Board prosecute a civil contempt proceeding. It is thus seen that Section 10 (f) has no relevancy to the point here at issue and could not give the Amalgamated standing to begin a civil contempt proceeding in its own behalf.

POINT V

The comprehensive and specific statutory plan for enforcement by the Board precludes the authority of anyone else to initiate proceedings and precludes the availability of other modes of enforcement

Amalgamated argues (Petition, pages 21-23; Brief, pages 22-23) that the absence of any statutory provisions authorizing or permitting it to institute contempt or enforcement proceedings is not fatal to its claimed standing; inasmuch as there *must be* a way for it to enforce its own "statutory rights" by its own action. Amalgamated argues that the Act was intended to make the Board only a Court of first instance, rather than an enforcement agency, and therefore that private persons need no statutory authority for making themselves the enforcement agency without action by the Board.

Where "statutory rights" are created and no provision for their enforcement by a public agency is made in the statute, equity jurisdiction may be invoked by private parties when it is essential to the protection of the rights asserted. Decisions such as those in *Texas & N. O. R. Company* v. *Brotherhood*, 281 U. S. 548, and *Virginia Railway Co.* v. *System Federation*, 300 U. S. 515, cited by the petitioner (Brief, page 34), illustrate the application of this principle. But a different rule applies, where, as here, the Congress has created and empowered a public agency to enforce the rights under the Act, and has also prescribed specific modes of enforcement. In that event a private person has no independent right to start its own proceedings to enforce, unless the statute expressly provides for and authorizes such action (*Lewis' Sutherland on Statutory Construction (2nd Ed.)*, Sections 491-493).

Analogies from other statutes

The Congress has dealt often with such a situation. The enactment of Section 16 of the Clayton Act in 1914 (Tit. 15 U. S. Code, Section 26) is in point. Private persons were thereby expressly authorized to bring suits to prevent and restrain violations of the Anti-Trust Act. Prior to its passage, this Court had ruled that the fourth section of the Sherman Anti-Trust Act of July 2, 1890 (c. 647, 26 Stat. 209), which directs the Attorney-General to institute proceedings to prevent and restrain violations under the Act, precluded a private person from maintaining suit for such purposes (*Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48). In the case last cited this Court said, as to the effect of Section 4 on the right of private suit (page 71):

> "* * * It is a safe and conservative interpretation, in view as well of the broad and exclusive power of Congress over interstate and international commerce as of the fact that, so far as such commerce is con-

cerned, Congress has prescribed a specific mode for preventing restraints upon it, namely, suits in equity under the direction of the Attorney General. Of the present suit the Attorney General has no control, and is without any responsibility for the manner in which it is conducted, although, in its essential features, it is just such a suit as would be brought by his direction when proceeding under the fourth section of the Anti-Trust Act."

The Securities Act of 1933 (48 Stat. 77, 84, 86; 49 Stat. 1291; Tit. 15 U. S. Code) authorizes the Securities and Exchange Commission to invoke the aid of Federal District Courts to enjoin acts or practices in violation of the Act (Section 77 t (b)); and by Section 77 (l) it makes the seller of a security violating Section 77 (e) "liable to the person purchasing such security from him" and authorizes the purchaser to sue either at law or in equity, thereby expressly giving the purchaser a statutory action which departs from common law civil liability. See: *Shulman, Civil Liability and the Securities Act* (1933), 43 Yale L. J. 227.

Section 16 (12) of the Interstate Commerce Act (36 Stat. 1167, Tit. 49 U. S. Code) is another illustration. It is there provided that if any carrier fails "to obey any order of the Commission other than for the payment of money", the Interstate Commerce Commission "or any party injured thereby" may apply to the appropriate District Court for the enforcement of such Order. As far as an Order for the payment of money is concerned, subdivision 2 of Section 16 gives "the complainant, or any person for whose benefit such order was made" authority to bring an action, in the nature of a civil suit, to recover damages resulting from non-compliance with the Commission's Order.[1]

[1] The provisions of Section 828 of the Shipping Board Act (46 U. S. Code) are similar to the provisions of Section 16 (12) of the Interstate Commerce Act, while Section 829 of the Shipping Board Act is similar to subdivisions (2) and (4) of Section 16. The provisions of the Packers and Stockyards Act (Tit. 7 U. S. Code

(*Footnote continued on next page.*)

The decisive fact here is that the National Labor Relations Act is not silent either as to the method of enforcement or as to the authorized movant for enforcement. At every step from investigation to enforcement decrees, the initiative is vested explicitly and only in the Board (see pages 18 to 23, *ante*). Findings and petition by the Board are conditions precedent. Those who assert rights by virtue of the Act must abide its procedures, which are often in derogation of remedies available at common law for rights which do not arise from such a statute.[1] The naming of those who may ask for enforcement of a remedial statute and the providing of specific remedies which they may use exclude enforcement by other persons or procedures.

Blankenship v. *Kurfman*, 96 Fed. (2nd) 450, 454;
Paine Lumber Company v. *Neal*, 244 U. S. 459;
Minnesota v. *Northern Securities Company*, 194 U. S. 48.

Intent of Congress as to contempt proceedings by the Board

In enacting the Act, the Congress clearly indicated its intention that contempt proceedings for violations of the Board's Orders should be instituted by the Board. H. R. Conference Report No. 1371 (74th Congress, 1st Sess.), as to the Wagner Act, said (page 5):

"* * * If such practice [unfair acts prohibited by an Order granted enforcement] is resumed, there will be immediately available to the Board an existing

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Sections 210 (f), 216; 42 Stat. 165, 167) are patterned after similar provisions of the Interstate Commerce Act. Thus, Section 216, which deals with enforcement of Orders other than for the payment of money, follows the language of Section 16 (12) of the Interstate Commerce Act, while the enforcement of Orders for the payment of money under the Stockyards Act (Section 210 (f)) follows Section 16 (2) of the Interstate Commerce Act.

[1] See *National Labor Relations Board* v. *Colten*, quoted on page 29, *ante*.

Court decree to serve as a basis for contempt proceedings."

As we read the decision of January 2, 1940, in *American Federation of Labor* v. *National Labor Relations Board*, this Court has held that it will not, at the instance of a labor organization claiming that "peculiar hardships" will otherwise be inflicted on it, read into the Act provisions and judicial remedies which are not there in express terms, but will be guided strongly by the legislative intent as shown by Committee hearings and Reports in the Congress. These rulings seem decisive against the Amalgamated's claim of standing for itself without express statutory sanction.

POINT VI

The Board's Order and the enforcement decree granted at the instance of the Board do not create private rights and remedies in derogation of the statutory plan of enforcement.

The enforcement decree which the Court entered at the request of the Board was in essence an affirmance of the Board's Order as against the questions of legality raised by "aggrieved" parties. The Order made more definite the "generic statutory prohibitions" of Section 8. In particular, the affirmance of the Board's action could not relate to or provide for unanticipated matters not litigated but subsequently arising.

Neither the Board nor the Court below could create a private right or remedy under the Act, which Congress did not grant by the Act itself. The Board's authority could not go beyond its provisions. The same limitation to appellate and revisory jurisdiction applies to the Circuit

Court of Appeals in proceedings to review or enforce the Board's Order.

Federal Trade Commission v. *Eastman Company*, 274 U. S. 619.

That case dealt with the scope of the Commission's and the Court's authority under Section 5 of the Federal Trade Commission Act. The Court held that the Commission's authority under Section 5 did not go beyond the administrative functions delegated to it by the Act. As to the power of the Circuit Court of Appeals on a petition to review, the Court said (pages 623-624) that such power

> "is limited to the question whether or not it [the Commission] has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond the authority of the Commission; such review being appellant and revisory merely, and not an exercise of original jurisdiction by the Court itself."

Read in the light of the limited authority of the Board in making the Order and of the Circuit Court of Appeals in decreeing its enforcement, it is obvious that neither the Order nor the decree of enforcement could grant, or was intended to grant, to the Amalgamated or any other labor organization any rights or remedies not granted by the Act itself, which, as shown fully on pages 13 to 29, *ante*, looks "only to public ends". Provisions not in the Act in express terms will not be read into the Act (*American Federation of Labor* v. *National Labor Relations Board*, U. S. ; decided January 2, 1940). To read into the provisions of the Order and the decree private rights and remedies not created by the Act would contravene the Act itself. *Rothschild & Co.* v. *Marshall*, 44 Fed. (2d) 546, 549.

The "cease and desist" provisions of the Board's Order specified and prohibited certain activities; e. g., encouraging membership in the I B E W and discouraging membership in "the Amalgamated or any other labor organization," etc.

Such prohibitions are declarative of the unfair labor practices proscribed by the Act, which are essentially "matters of public concern, by their nature and consequences, present or potential" (Report of the House Committee on Labor—No. 972; 74th Congress).[1] Being matters of public concern, a violation of the restraining Order and decree would not give the Amalgamated any private interest as distinguished from the paramount concern of the general public. Absent a recognized private and personal interest differing from that of the general public, there is no legal right or standing of a private party to guard the public against illegal acts; and the Court should not entertain a private proceeding to punish a party for violating an Order in which the public is primarily concerned (*Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 406; *Secor* v. *Singleton*, 35 Fed. 376). In the case last cited, the Court stated the guiding principle (page 378):

> "• • • In cases where an injunction has been granted to enforce or maintain a merely private right, a proceeding instituted to punish a party for violating the Order is very generally regarded as a proceeding to redress a private injury in which the public have no concern, and for that reason the prosecutor or person filing the information must have an interest in the proceeding differing from that of the general public; otherwise the Courts will not entertain the information. *Hawley* v. *Bennett*, 4 Paige, 163; Rap. Contempt, § 127; 2 High, Inj. (2d Ed.) § 1449. • • •"

Amalgamated does not here show monetary damages or assert any specific injury to itself or its members beyond the loss of private advantages which would be gained as an incident to the enforcement of the paramount public rights (*Sprunt and Son* v. *United States, supra*). To show his standing as a litigant, a complainant must show injury to him, not to others. *McCabe* v. *Atchison, Topeka & Santa Fe Railway Co.*, 235 U. S. 151, 162. He "must possess some-

[1] See, also, foot-note 1 on page 29.

thing more than a common concern for obedience to law." *Western Pacific California Railroad Company* v. *Southern Pacific Company*, 284 U. S. 47, 51. Absent any damages which can be admeasured, there could be no basis for maintaining a civil contempt (*Judelshon* v. *Black*, 64 Fed. (2d) 116, 117):

> "* * * The theory of recovery in civil contempt proceedings is to compel the payment of damages by way of a fine, and, since no damages were suffered, there should be no finding of contempt."

Amalgamated cannot constitute itself the guardian of the public. The Congress vested that function in the Board, which alone may exercise it. As was pointed out by Mr. Justice Brandeis, in his concurring opinion in *Ashwander* v. *Valley Authority*, 297 U. S. 288, 343:

> "* * * The function of guarding the public against acts deemed illegal rests with the public officials."

An unfounded argument from "practicality"

Amalgamated's brief (pages 43-44) as well as its petition (pages 7-9) argue that the Act must be construed so as to authorize a labor organization to bring its own proceeding to punish violations of a Board Order as a contempt of Court. The argument is that otherwise a burden of surveillance over compliance with its Orders and the decrees of enforcement will be placed on the Board, and there will be danger of a breakdown in enforcement. The following observation as to private prosecutions seems pertinent[1]:

> "The admission of private prosecution may be looked upon as an attempt to relieve the Commission of part of its burden, but the result must often be the opposite, forcing the Commission to take up a problem which on its own initiative it might prefer to leave alone."

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[1] *Freund, Administrative Powers Over Persons and Property* (1928), page 167.

We are not here concerned with the wisdom of the legislative intent[1] and policy that contempt proceedings as to violations of the Board's Orders shall be brought by the Board. The Courts have no authority to overrule that intent and vary the Act by according to labor organizations rights of resort to Court which are not granted and provided for in the Act.

American Federation of Labor v. *National Labor Relations Board*, —— U. S. ——; decided January 2, 1940.

Had the Board exhausted its authority by filing the Transcript?

Amalgamated argues that the Board had spent all its powers of enforcement when it filed the Transcript of Record with the Circuit Court in the enforcement proceedings. Amalgamated cites the decision of this Court in *Ford Motor Company* v. *Labor Board*, 305 U. S. 364, as holding that by such filing "the Board lost all jurisdiction of the matter, and can act thereafter *only in pursuance to an Order or direction from the Circuit Court of Appeals*" (Brief, page 42).

Such an argument by the Amalgamated proves too much. If it is well taken, then each of the Circuit Courts of Appeals which has entertained civil contempt proceedings instituted by the Board and has adjudicated employers to be in civil contempt of Court upon the Board's motion[2] has been grossly in error and their adjudications are a nullity. Such a view of the *Ford Motor* decision would mean that if private parties failed to initiate civil contempt proceedings for violations of a Board Order, the Board itself would be powerless to act, for it would be without authority or standing to invoke the Court's aid to punish the violators of its Orders, although the Court had decreed their enforcement at the instance of the Board. It would place in private and biased

[1] See pages 42 and 43.

[2] See footnote on page 13, *ante*.

hands the sole responsibility for safeguarding the public against interruption of commerce caused by civil disobedience of the Board's Order.

No such serious consequences seem to us to flow from the decision of this Court in the *Ford Motor* case. As we read it, the decision was that the Board has no absolute right to withdraw its petition for enforcement, for the purpose of modifying or setting aside its findings and Order under Section 10 (d) of the Act, and thereby to divest the Court of its jurisdiction, which the filing of the transcript by the Board had conferred upon it. The situation here is different. A proceeding by the Board to punish for a civil contempt would not involve the modification or setting aside of its findings and Order or the divesting of the Circuit Court of its jurisdiction over its decree. The Congress and the Act clearly contemplated, as we have shown, that the enforcement of the Board's Order, whether by Section 10(c) or by contempt proceedings, shall at all times remain in the keeping of the Board. The Board has itself taken the position that the Act does not permit it "to make labor organizations parties to its proceedings" (Brief in opposition to the petition of the I B E W for certiorari in Docket No. 19—October Term, 1938). The power to prevent and redress unfair labor practices is expressly vested *exclusively* in the Board (Section 10 (a)). By making the Board's power exclusive, the Act impliedly precludes anyone else from exercising it. This primary and exclusive jurisdiction to prevent and redress unfair labor practices affecting commerce must necessarily extend to the power to initiate proceedings for civil contempt. Such a proceeding is essentially a continuance of the enforcement proceeding initiated by the Board. As was said by this Court in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444-445:

> "Proceedings for civil contempt are between the original parties and are instituted and tried as part of the main cause."

nishment for civil contempt is an enforcement procedure d was so intended by the Amalgamated (R. 13). It is erely a "continuance of the earlier action and is a step the enforcement of our previous judgment" (*Labor oard* v. *Hopwood Retinning Co.*, 104 Fed. (2d) 302, 305).

In Conclusion

The above-stated considerations confirm abundantly the ent of the Congress to make the Board "the paramount ency for dealing with the unfair labor practices described the bill"[1] and to give the Board "exclusive jurisdiction prevent and redress unfair labor practices",[2] at the same ne stating that "No private right of action is contemted".[3] That any contempt proceedings as to violations Board Orders should be brought by the Board was made ar in the Conference Report[4] which led to the enactment the Act. The intent and purpose of conferring this exclue power on the Board were stated clearly to be[5]

> "to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American Law regarding collective bargaining".

These clear evidences of the legislative intent, coupled h the absence of statutory sanction for the bringing an enforcement proceeding or an ancillary contempt proding by a private labor organization, seem to us to be

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[1] House Report No. 972; 74th Congress, 1st Session, page 21; also, pages 21-22, *ante*.

[2] Senate Report No. 573; 74th Congress, 1st Session, page 15; also, page 22, *ante*.

[3] House Report No. 972, page 21; see, also, page 22, *ante*.

[4] House Conference Report No. 1371, page 5; see, also, page 42, *ante*.

[5] Senate Report No. 573, page 15; see, also, page 22, *ante*.

conclusive against the Amalgamated's standing as movant here.

American Federation of Labor v. *National Labor Relations Board*, U. S. ; decided January 2, 1940.

POINT VII

The decision and Order below were correct and plainly in accord with the wording and the declared intent of the Act and with the sound functioning of the procedures set up in the field of labor relations, and should be affirmed

Dated, January 3, 1940

Respectfully submitted

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APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935; c. 372, 49 Stat., 449, U. S. C., Sup. II, Title 29, Sec. 151, *et seq.*) are as follows:

Section 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise. • • •

(e) The Board shall have power to petition any Circuit Court of Appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the Circuit Courts of Appeals to which application may be made are in vacation, any District Court of the United States (including the Supreme Court of the District of Columbia), within any Circuit or District, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such Order and for appropriate temporary relief or restraining Order, and shall certify and file in the Court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such Order was entered and the findings and Order of the Board. Upon such filing, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining Order as it deems just and proper and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the Order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The

findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the Court for leave to adduce additional evidence and shall show to the satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the Court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original Order. The jurisdiction of the Court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate Circuit Court of Appeals if application was made to the District Court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, Secs. 346 and 347).

(f) Any person aggrieved by a final Order of the Board granting or denying in whole or in part the relief sought may obtain a review of such Order in any Circuit Court of Appeals of the United States in the Circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such Court a written petition praying that the Order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the Court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the Order complained of was entered and the findings and Order of the Board. Upon such filing, the Court shall pro-

ceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining Order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the Order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

Board's Order as modified by this Court

The Order of the National Labor Relations Board dated November 10, 1937, as modified by the decree of enforcement entered January 21, 1939 (R. 5-7), in pursuance of the Mandate of this Court (305 U. S. 197, 238, 239), is as follows:

"Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondents, Consolidated Edison Company of New York, Inc., and its affiliated companies: Brooklyn Edison Company, Inc., New York and Queens Electric Light and Power Company, Westchester Lighting Company, The Yonkers Electric Light and Power Company, New York Steam Corporation, Consolidated Telegraph and Electrical Subway Company, their officers, agents, successors, and assigns shall:

"1. Cease and desist from:

"a. Discouraging membership in United Electrical and Radio Workers of America or any other labor organization of their employees, or encouraging membership in International Brotherhood of Electrical Workers or any other labor organization of their employees, by discharging or refusing to reinstate any of their employees or in any other manner discriminating in regard to their hire or

tenure of employment or any term or condition of their employment because of membership or activity in connection with any such labor organization;

"b. Urging, persuading, warning, or coercing their employees to join International Brotherhood of Electrical Workers, or any other labor organization of their employees, or threatening them with discharge if they fail to join any such labor organization;

"c. Permitting organizers and collectors of dues for International Brotherhood of Electrical Workers or any other labor organization to engage in activities among their employees in behalf of such labor organizations during working hours or on the respondents' property, unless similar privileges are granted to United Electrical and Radio Workers of America and all other labor organizations of their employees;

"d. Permitting their employees who were officials of the Employees' Representation Plans to use the respondents' time, property and money in behalf of International Brotherhood of Electrical Workers or any other labor organization of their employees;

"e. Employing detectives to investigate the activities of their employees in behalf of United Electrical and Radio Workers of America or any other labor organization of their employees or employing any other form or manner of espionage for such purposes;

"f.[1] Giving effect to their contracts with the International Brotherhood of Electrical Workers;

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[1] This clause 1 (f) of the Board's Order was eliminated by the Court below, in pursuance of the Mandate of this Court. The opinion in *Consolidated Edison Company* v. *National Labor Relations Board*, 305 U. S. 197, said, at page 238:

"We conclude that the Board was without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's Order."

"g.[1] Recognizing the International Brotherhood of Electrical Workers as the exclusive representative of their employees;

"h. In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection.

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

"a. Offer to Martin A. Wersing, Julius A. Greulich, Michael A. Wagner, William J. Kennedy, John F. Elmer, and Stephen L. Solosy immediate and full reinstatement to their former positions without prejudice to their seniority and other rights or privileges;

"b. Make whole Martin A. Wersing, Julius A. Greulich, Michael A. Wagner, William J. Kennedy, John F. Emler, and Stephen L. Solosy for any loss of pay they have suffered by reason of their discharges, by payment to each of them of a sum equal to that which he would normally have earned as wages during the period from the date of his dis-

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[1] Concerning the meaning and effect of subdivision (g) of the Board's Order, this Court said (305 U. S. 197, at page 239):

"Subdivision (g) of that paragraph, requiring the companies to cease recognizing the Brotherhood 'as the exclusive representative of their employees' stands on a different footing. The contracts do not claim for the Brotherhood exclusive representation of the companies' employees but only representation of those who are its members, and the continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of 'representation' should arise. § 9. We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act. So construed, that subdivision merely applies existing law."

charge to the date of such offer of reinstatement, less the amount earned by him during such period;

"c. Post immediately notice to their employees in conspicuous places through their offices, buildings, plants and other places of employment stating: (1) that the respondents will cease and desist in the manner aforesaid; (2) that the respondents' employees are free to join or assist any labor organization for the purposes of collective bargaining with the respondents; (3) that the respondents will bargain collectively with any labor organization entitled thereto; (4) that the respondents will not discharge, or in any manner discriminate against members of United Electrical and Radio Workers of America or any other labor organization of their employees or any person assisting such organizations by reason of such membership or assistance; (5) that the respondents will not discharge, or in any manner discriminate against any employee for refusal or failure to join or assist International Brotherhood of Electrical Workers or any other labor organization of their employees; (6) that such notices will remain posted for a period of at least thirty (30) consecutive days from the date of posting;

"d. Notify the Regional Director for the Second Region in writing within ten (10) days from the date of this Order what steps the respondents have taken to comply herewith.

"3. The complaint, in so far as it alleges that the respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(2) of the Act, is hereby dismissed without prejudice."

SUPREME COURT OF THE UNITED STATES.

No. 342.—October Term, 1939.

Amalgamated Utility Workers, Affiliated with Utility Workers Organizing Committee, Congress of Industrial Organizations, Petitioner,
vs.
Consolidated Edison Company of New York, Inc., et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 26, 1940.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The National Labor Relations Board ordered the Consolidated Edison Company of New York and its affiliated companies to desist from certain labor practices found to be unfair and to take certain affirmative action. The Circuit Court of Appeals granted the Board's petition for enforcement of the order, and its decree, as modified, was affirmed by this Court. 305 U. S. 197. Petitioner, Amalgamated Utility Workers, brought the present proceeding before the Circuit Court of Appeals to have the Consolidated Edison Company and its affiliated companies adjudged in contempt for failure to comply with certain requirements of the decree.

The Board, in response to the motion, asserted its willingness to participate in an investigation to ascertain whether acts in violation of the decree had been committed and suggested that the court direct such investigation as might be deemed appropriate.

The Court of Appeals denied the application upon the ground that petitioner had "no standing to press a charge of civil contempt, if contempt has been committed". The court held that under the National Labor Relations Act "the Board is the proper party to apply to the court for an order of enforcement and to present to the court charges that the court's order has not been obeyed". 106 F. (2d) 991. In view of the importance of the question in relation to the proper administration of the National Labor Relations Act, we granted certiorari. October 16, 1939.

Petitioner contends that the National Labor Relations Act[1] "creates private rights"; that the Act recognises the rights of labor organizations; and that it gives the parties upon whom these rights are conferred status in the courts for their vindication. In support of its alleged standing, petitioner urges that under its former name (United Electrical and Radio Workers of America) it filed with the National Labor Relations Board charges against the respondent companies, and that it was upon these charges that the Board issued its complaint and held the hearing which resulted in the order in question. Also, that petitioner was permitted to intervene in the proceedings before the Circuit Court of Appeals where the companies had moved to set aside the Board's order and the Board had moved to enforce it; and that the petitioner had also been heard in this Court in the certiorari proceedings for review of the decree of enforcement.

Petitioner invokes the statement in Section 1 of the Act of "findings and policy", with respect to the effect of the denial by employers of the right of employees to organize and to bargain collectively, and in particular the provision of Section 7[2] that

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection".

Neither this provision, nor any other provision of the Act, can properly be said to have "created" the right of self-organization or of collective bargaining through representatives of the employees' own choosing. In *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 33, 34, we observed that this right is a fundamental one; that employees "have as clear a right to organize and select their representatives for lawful purposes" as the employer has "to organize its business and select its own officers and agents"; that discrimination and coercion "to prevent the free exercise of the right of employees to self-organization and representation" was a proper subject for condemnation by competent legislative authority. We noted that "long ago" we had stated the reason for labor organiations.—that through united action employees might have "opportunity to deal on an equality with

[1] 49 Stat. 449, 29 U. S. C. 151, *et seq.*

[2] 29 U. S. C. 157.

their employer", referring to what we had said in *American Steel Foundries* v. *Tri-City Central Council*, 257 U. S. 184, 209. And in recognition of this right, we concluded that Congress could safeguard it in the interest of interstate commerce and seek to make appropriate collective action "an instrument of peace rather than of strife". To that end Congress enacted the National Labor Relations Act.

To attain its object Congress created a particular agency, the National Labor Relations Board, and established a special procedure. The aim, character and scope of that special procedure are determinative of the question now before us. Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective.

Congress declared that certain labor practices should be unfair, but it prescribed a particular method by which such practices should be ascertained and prevented. By the express terms of the Act, the Board was made the exclusive agency for that purpose. Section 10(a) provides:[3]

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise".

The Act then sets forth a definite and restricted course of procedure. A charge of an unfair labor practice may be presented to the Board, but the person or group making the charge does not become the actor in the proceeding. It is the Board, and the Board alone or its designated agent, which has power to issue its complaint against the person charged with the unfair labor practice. If complaint is issued, there must be a hearing before the Board or a member thereof or its agent. The person against whom the complaint is issued may answer and produce testimony. Other persons may be allowed to intervene and present testimony, but only in the discretion of the Board, or its member or agent conducting the hearing. Section 10(b).[4] The hearing is under the control of the Board.

[3] 29 U. S. C. 160(a).
[4] 29 U. S. C. 160(b).

The determination whether or not the person named in the complaint has engaged or is engaging in the unfair labor practice rests with the Board. If the Board is of the opinion that the unfair labor practice has been shown, the Board must state its findings of fact and issue its "cease and desist" order with such affirmative requirements as will effectuate the policy of the Act. Section 10(c).[5]

So far, it is apparent that Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.

When the Board has made its order, the Board alone is authorized to take proceedings to enforce it. For that purpose the Board is empowered to petition the Circuit Court of Appeals for a decree of enforcement. The court is to proceed upon notice to those against whom the order runs and with appropriate hearing. If the court, upon application by either party, is satisfied that additional evidence should be taken, it may order the Board, its member or agent, to take it. The Board may then modify its findings of fact and make new findings. The jurisdiction conferred upon the court is exclusive and its decree is final save as it may be reviewed in the customary manner. Section 10(e).[6] Again, the Act gives no authority for any proceeding by a private person or group, or by any employee or group of employees, to secure enforcement of the Board's order. The vindication of the desired freedom of employees is thus confided by the Act, by reason of the recognized public interest, to the public agency the Act creates. Petitioner emphasizes the opportunity afforded to private persons by Section 10(f).[7] But that opportunity is given to a person aggrieved by a final order of the Board which has granted or denied in whole or in part the relief sought. That is, it is an opportunity afforded to *contest* a final order of the Board, not to *enforce* it.

[5] 29 U. S. C. 160(c).
[6] Section 160(e).
[7] 29 U. S. C. 160(f).

The procedure on such a contest before the Circuit Court of Appeals is assimilated to that provided in Section 10(e) when the Board seeks an enforcement of its order. But that assimilation does not change the nature of the proceeding under Section 10(f), which seeks not to require compliance with the Board's order but to overturn it.

What Congress said at the outset, that the power of the Board to prevent any unfair practice as defined in the Act is exclusive, is thus fully carried out at every stage of the proceeding. The text of the Act is so clear in this respect that there is no need to comment upon its legislative history. But this puts in a strong light the legislative intent. In the Senate, the Committee on Education and Labor in its report on the bill said:[8]

"Section 10(a) gives the National Labor Relations Board exclusive jurisdiction to prevent and redress unfair labor practices, and, taken in conjunction with section 14, establishes clearly that this Act is paramount over other laws that might touch upon similar subject matters. Thus it is intended to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining".

And the Committee on Labor of the House of Representatives in its report stated:[9]

"The Board is empowered, according to the procedure provided in section 10, to prevent any person from engaging in any unfair labor practice listed in section 8 'affecting commerce' as that term is defined in section 2(7). This power is vested exclusively in the Board and is not to be affected by any other means of adjustment or prevention. The Board is thus made the paramount agency for dealing with the unfair labor practices described in the bill".

After referring to the suitable adaptation of the Board's orders to the needs of particular cases, and especially to the power to reinstate employees with or without back pay, the Committee continued:

"No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint. The

[8] Sen. Rep. No. 573, 74th Cong., 1st sess., p. 15.
[9] H. R. Rep. No. 972, 74th Cong., 1st sess., p. 21.

form of injunctive and affirmative order is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by the law declared to be detrimental to the public weal".

In both Houses of Congress, the Committees were careful to say that the procedure provided by the bill was analogous to that set up by the Federal Trade Commission Act, section 5,[10] which was deemed to be "familiar to all students of administrative law". That procedure, which was found to be prescribed in the public interest as distinguished from provisions intended to afford remedies to private persons, was fully discussed by this Court in *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 25, where it was said:

"Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it".

That sort of procedure concerning unfair competition was contrasted with that provided by the Interstate Commerce Act in relation to unjust discrimination. We said that "in their bearing upon private rights" they are "wholly dissimilar". The Interstate Commerce Act imposes upon the carrier many duties and creates in the individual corresponding rights. For the violation of the private right it affords "a private administrative remedy". The interested person can file as of right a complaint before the Interstate Commerce Commission and the carrier is required to make answer. We said that the Federal Trade Commission Act "contains no such features". *Id.*, p. 26. The present Act, drawn in analogy to the Federal Trade Commission Act, contains no such features.

As Congress has in this instance created a public agency entrusted by the terms of its creation with the exclusive authority

[10] 38 Stat. 719, 15 U. S. C. 45.

for the enforcement of the provisions of the Act, decisions dealing with the legal obligations arising under the Railway Labor Act[11] cannot be regarded as apposite. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 569, 570; *Virginian Railway Company* v. *System Federation No. 40*, 300 U. S. 515, 543, 544.

We think that the provision of the National Labor Relations Act conferring exclusive power upon the Board to prevent any unfair labor practice, as defined,—a power not affected by any other means "of prevention that has been or may be established by agreement, code, law, or otherwise", necessarily embraces exclusive authority to institute proceedings for the violation of the court's decree directing enforcement. The decree in no way alters, but confirms, the position of the Board as the enforcing authority. It is the Board's order on behalf of the public that the court enforces. It is the Board's right to make that order that the court sustains. The Board seeks enforcement as a public agent, not to give effect to a "private administrative remedy". Both the order and the decree are aimed at the prevention of the unfair labor practice. If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented. The Board still remains as the sole authority to secure that prevention. The appropriate procedure to that end is to ask the court to punish the violation of its decree as a contempt. As the court has no jurisdiction to enforce the order at the suit of any private person or group of persons, we think it is clear that the court cannot entertain a petition for violation of its decree of enforcement save as the Board presents it. As the Conference Report upon the bill stated,[12] in case the unfair labor practice is resumed, "there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings".

The order of the Court of Appeals denying petitioner's motion is affirmed.

Affirmed.

Mr. Justice MURPHY took no part in the consideration and decision of this cause.

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[11] 45 U. S. C. 151. See 50 Harvard Law Review 1089, 1090.

[12] Conference Report, Cong. Rec., 74th Cong., 1st sess., pt. 9, p. 10,299.